HE INDIAN LAW REPORTS.

MADRAS SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT MADRAS
AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT.

REPORTED BY

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1st January—31st December 1907.

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THE

INDIAN LAW REPORTS,

Madras Series.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

PERIA KOVIL RAMANUJA PERIYA JEEYANGAR BY HIS AUTHORISED AGENT K. VENKATACHARIAR (DEFENDANT-RESPONDENT), APPELLANT, 1906. April 25. July 17. August 31.

v.

LAKSHMI DOSS (PLAINTIFF-PETITIONER), RESPONDENT.*

Limitation Act XV of 1877, sched. II, art. 179—Where second appeal preferred, time runs from date of order finally disposing of such appeal.

Where a second appeal is preferred and an order is made by the Court to which the appeal is preferred which has the effect of finally disposing of the appeal, time runs from the date of such order; and it makes no difference that such second appeal was withdrawn by the appellant.

Patloji v. *Ganu*, (I.L.R., 15 Bom., 370), dissented from.

Abdul Rahiman v. *Maidin Saiba*, (I.L.R., 22 Bom., 500 at p. 506), dissented from.

THE facts necessary for this report are set out by (Subrahmania Ayyar and Sankaran Nair, JJ.) in the Order of Reference to the Full Bench.

ORDER OF REFERENCE TO A FULL BENCH.—The decree which awarded the rent for fasli 1305 to the present respondent was passed on appeal on the 15th July 1901. A second appeal was

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* Civil Miscellaneous Second Appeal No. 82 of 1905, presented against the decree of F. H. Hamnett, Esq., District Judge of Chingleput, in Appeal Suit No. 36 of 1905, presented against the order of M.R.Ry. T. N. Ramachendra Aiyar, District Munsif of Poonamallee, in Execution Petition No. 4 of 1905, in Original Suit No. 287 of 1899.

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PERIA KOVIL RAMANUJA PERIA JEEYANGAR v. LAKSHMI DOSS.

filed against that decree by the defendant, the appellant before us but that was withdrawn on the 2nd March 1903, the High Court passing the following order:—"The appellant's vakil having applied for permission to withdraw the appeal, it is ordered that this appeal be, and it hereby is, dismissed; and it is further ordered that the appellant do pay to the respondent his costs of this second appeal."

The present application for the execution of the decree was presented on the 13th December 1904. The District Judge held that the application was not barred by limitation inasmuch as it was within three years from the order in second appeal quoted above. This decision is rested on *Wazir Mahton* v. *Lulit Sing*(1). The observations in *Patloji* v. *Ganu*(2) and *Abdul Rahiman* v. *Maidin Saiba*(3) are in favour of the view that when an appeal is withdrawn there is no decree of the Appellate Court.

Having regard to this conflict of views and the importance of the question we refer for the opinion of the Full Bench the following question:—

"Whether the application for execution was or was not time-barred."

The case came on for hearing in due course before the Full Bench constituted as above.

C. Ayyasami Sastri for appellant.

K. Kuppuswami Ayyar for *S. Subrahmania Ayyar* for respondent.

The Court expressed the following

OPINION.—We are unable to agree with the view taken by the Judges of the Bombay High Court in the Bombay cases mentioned in the Order of Reference. We are of opinion that when a second appeal is preferred and an order is made by the Court to which the appeal is preferred which has the effect of finally disposing of the appeal, time runs from the date of that order and not from the date of the decree against which the appeal has been preferred.

Our answer to the question referred to us therefore is that the application for execution was not time-barred.

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(1) I.L.R., 9 Calc., 100. (2) I.L.R., 15 Bom., 370.
(3) I.L.R., 22 Bom., 500 at p. 506.

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The appeal came on for final hearing before (Subrahmania Ayyar and Sankaran Nair, JJ.) when the Court delivered the following

PERIA KOVIL RAMANUJA PERIA JEEYANGAR v. LAKSHMI DOSS.

JUDGMENT.—Following the opinion of the Full Bench we dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

SUBBAMMAL, MINOR, THROUGH HER NEXT FRIEND PALANIAPPA PILLAI (PLAINTIFF), APPELLANT,

1906. August 3, 6.

v

AVUDAIYAMMAL AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Reversioner bound by decree obtained against widow without fraud or collusion, though without contest—Alienation by one of several widows not invalid ipso facto.

A decree on a claim binding on the inheritance though obtained without contest against the widow in possession is binding on the reversionary heir in the absence of fraud or collusion.

The widow as representing the estate is not bound to raise any defence when she is satisfied that the debt is really due.

An alienation by one of two co-widows is not *ipso facto* invalid with reference to the interest of the other co-widow or of persons interested in the reversion.

SUIT for a declaration that the mortgage of the land in the plaint schedule I to the sixth defendant and the sale by auction of the lands in plaint schedules 2 to 4 in favour of the seventh defendant were fraudulent and were not valid and binding against the reversionary right of the plaintiff.

Plaintiff's case was that Palaniappa Pillai, to whom the plaint properties belonged, died without male issue on 7th November 1894, leaving behind him his third and fourth widows, the defendants Nos. 1 and 3 in this suit, the plaintiff, a daughter by his second widow, the second defendant, a daughter of the first defendant, and defendants Nos. 4 and 5, daughters of the third defendant; that his

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* Appeal No. 4 of 1904, presented against the decree of M.R.Ry. S. Raghunathaiya, Subordinate Judge of Tinnevelly, in Original Suit No. 4 of 1903.

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SUBBAMMAL v. AVUDAIYAMMAL.

property devolved on defendants Nos. 1 and 3 as his heirs; that first defendant and others fabricated a promissory note for Rs. 3,000 purporting to have been executed on 10th October 1893 by Palaniappa Pillai in favour of Vallikannammal, the eighth defendant in this suit; that the said Vallikannammal sued on the said promissory note in Original Suit No. 50 of 1896 on the file of the Subordinate Court of Tinnevelly and, in collusion with defendants Nos. 1 and 3, obtained a decree; that first defendant mortgaged the plaint first schedule property on 4th August 1900 to the sixth defendant as if to pay in part the said decree; that the decree was subsequently assigned to the ninth defendant in this suit, who brought the plaint schedule properties in II to IV to sale, and seventh defendant purchased them on 9th September 1900.

The lower Court found that the promissory note executed in favour of the eighth defendant was genuine; that the decree in Original Suit No. 50 of 1896 was obtained *bonâ fide*; and that the mortgage and Court sale under which the sixth and seventh defendants claimed were *bonâ fide* and binding on the plaintiff. The plaintiff's suit was therefore dismissed.

Plaintiff preferred this appeal.

S. Venkatachari for *C. Sankaran Nair* for appellant.

K. Srinivasa Ayyangar for sixth and seventh respondents.

JUDGMENT.—We see no reason to differ from the decision of the Subordinate Judge. The evidence in the case is all on one side, the plaintiff having called no evidence. There is a large body of oral testimony, including that of the eighth defendant herself, which supports the contention of the defendants that a loan of Rs. 3,000 was, in truth, made by the eighth defendant to the deceased Palaniappa Pillai, and that the promissory note (exhibit I) was executed by him for the debt. The comparison of the proved signatures of Palaniappa on other documents with his signature on the bond is also in favour of its genuineness.

The debt due under the note was treated as one payable out of the estate in exhibit II, the agreement executed a few months after the death of Palaniappa between his two widows, the present first and third defendants. There is no ground whatever for treating the recitals in that document with reference to the present debt as otherwise than *bonâ fide*. It is, therefore, established that the debt for which the decree was obtained by the eighth defendant

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against the first defendant was one binding upon the inheritance, which the plaintiff, therefore, cannot avoid. It was, however, strongly urged for the plaintiff that, though in the suit brought by the eighth defendant on the note, the third defendant was made a party, yet, as the eighth defendant did not proceed to a trial as against her, but consented to a decree as against the assets of the deceased in her own (first defendant's) hands only, on her own admission in the written statement that the debt was due, the decree cannot have any operation except as against the life interest of the first defendant, and that the plaintiff, therefore, is entitled to a declaration that the mortgage in favour of the sixth defendant for the Rs. 1,800 raised to pay off part of the decree, and also the Court sale for the remainder of the decree amount in which the first defendant made the purchase are not binding upon the plaintiff. This contention seems to us to be unsustainable. There is no question here of *res judicata.*

The plaintiff having had the opportunity of proving that the debt for which the decree was obtained was, in fact, not due or was, for any reason, not payable out of the estate the only point for consideration is whether the mortgage and sale relied on by the sixth and seventh defendants was prejudicial to the plaintiff's reversionary interests. No attempt has been made to show this. The evidence shows that the sixth defendant did in fact pay the Rs. 1,800 on account of the decree passed in favour of the eighth defendant on the note. It cannot be suggested that the terms of the mortgage are not reasonable, nor does it appear that the Court sale for the remainder of the debt under which the seventh defendant claims is detrimental to the estate. The decree, no doubt, was not the result of an actual contest, but it is perfectly clear that there was no collusion or fraud in obtaining it.

The first defendant as representing the estate was certainly not bound to raise any defence in the case when satisfied that the debt was really due. The eighth defendant in contenting herself with a decree against the assets in the hands of the first defendant followed a course which in our opinion was justified, for under the agreement (exhibit II), already referred to the bulk of the estate of Palaniappa had been left with the third defendant's consent in the hands of the first defendant, and the obligation to discharge this debt among others was part of their agreement. As regards the passages relied upon from *Sri Gajapati Radhamani* v. *Maharani*

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Sri Pusapati Alakajeswari(1) that depended upon the special circumstances of that case. The case of *Kalliyana Sundaram Pillai* v. *Subba Moopanar*(2) is a distinct authority against the contention that an alienation by one of two co-widows is *ipso facto* invalid with reference to the interest of the other co-widow or of other persons interested in the reversion.

We, therefore, dismiss the appeal with costs.

As regards the memoranda of objections by the sixth and seventh defendants, the decree of the lower Court will be modified by allowing them the vakils' fees certified, subject to the maximum fees payable to them under the rules. We make no order as to the costs of these memoranda.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

1906. July 9, 10, 18.

CHIDAMBARAM CHETTIAR (PLAINTIFF), APPELLANT IN APPEAL SUIT No. 181 of 1902,

v.

SAMI AIYAR *alias* ARUNACHELLA AIYAR AND OTHERS (DEFENDANTS), RESPONDENTS.

CHIDAMBARAM CHETTIAR (PETITIONER), APPELLANT IN APPEAL AGAINST ORDER No. 60 OF 1902,

v.

SRINIVASA SASTRIYAL AND OTHERS (COUNTER-PETITIONERS), RESPONDENTS.*

*Fraudulent transfer of moveables—*13 *Elizabeth, c.* 5, *and the Transfer of Property Act IV of* 1882, *s.* 53*—Transfer, though for valuable consideration void if made to defeat creditiors—Such transfer not valid even in part.*

Section 53 of the Transfer of Property Act does not apply to transfers of moveable property.

A transfer of moveable property by a debtor is valid as against his creditors only when it is made *boná fide* and for valuable consideration.

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(1) I.L.R., 16 Mad., 1 at p. 10. (2) 14 Mad. L.J., 189.

* Appeal No. 181 of 1902 and Civil Miscellaneous Appeal No. 60 of 1902, presented against the decree and order of M.R.Ry. P. S. Gurumurti, Subordinate Judge of Kumbakonam, in Original Suit No. 2 of 1902, and in Execution Petition No. 208 of 1900 in Original Suit No. 12 of 1899, respectively.

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Where a transfer, though in part for valuable consideration, is, as regards the other part, only an arrangement to defeat creditors it is wholly void against the creditors both under section 53 of the Transfer of Property Act and under 13 Elizabeth, c. 5, and cannot be upheld to the extent to which it is supported by consideration.

There is nothing in the statute of Elizabeth or in section 53 of the Transfer of Property Act to prevent a debtor giving preference to a creditor if nothing is done to affect the other creditors injuriously.

Twyne's Case, (3 Co. Rep., 80), referred to and followed.

Ramasamia Pillai v. *Adinarayana Pillai*, (I.L.R., 20 Mad., 465), distinguished.

THESE appeals arose out of proceedings in execution of the decree in Original Suit No. 12 of 1899. The decree-holder in that suit, Sami Aiyar, assigned the decree to Annamalai Chetti. The appellant claiming through the said Annamalai Chetti, applied under sections 232 and 250 of the Code of Civil Procedure to be brought on record as transferee decree-holder, and on the objection of various parties who had attached the decree in Original Suit No. 12 of 1899 in execution of decrees against Sami Aiyar, his petition was dismissed. The appellant thereupon brought Original Suit No. 2 of 1902 to establish his claim as assignee of the decree. The suit was dismissed on the ground that his remedy was by appeal against the order in execution proceedings and not by a separate suit.

Appeal No. 181 of 1902 was preferred to the High Court against the decree in Original Suit No. 2 of 1902 and Appeal Against Order No. 60 of 1902 was preferred against the order in execution refusing to recognise the transfer to the appellant. Such further facts as are necessary are set out in the judgment of the High Court.

V. Krishnaswami Ayyar and *S. Srinivasa Ayyangar* for appellant.

The Hon. Mr. *P. S. Sivaswami Ayyar* for nineteenth respondent.

JUDGMENT.—These appeals raise the question of the validity of the assignment of a decree obtained by one Sami Aiyar, in Original Suit No. 12 of 1899 on the file of the Subordinate Court of Kumbakonam to one Annamalai Chetti, through whom the appellant claims as against other creditors of Sami Aiyar, who are the respondents.

The facts are that a sum of over Rs. 14,000 was held in deposit by the Court to the credit of Sami Aiyar as decree-holder in Original Suit No. 12 of 1899. Sami Aiyar was himself indebted to various persons, and some of them obtained decrees

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CHIDAMBARAM CHETTIAR v. SAMI AIYAR.

against him for the sums due. Annamalai Chetti was one of the decree-holders (Original Suit No. 93 of 1899) and he obtained exhibit A, dated the 28th March 1900, from Sami Aiyar, whereby the latter purported to assign to him his rights under the decree in Original Suit No. 12 of 1899. The consideration for the assignment recited in the deed, viz., Rs. 15,000 was stated to consist of (1) Rs. 4,390, principal, interest and costs due to Annamalai's firm under the decree already referred to (Original Suit No. 93 of 1899); (2) Rs. 1,650 or so due to Lakshmana Chetti in Suit No. 65 of 1899; (3) Rs. 1,185 due to K. Srinivasa Aiyar under promissory note C; and (4) a cash payment of Rs. 7,775 before the Sub-Registrar. Though this last-mentioned sum was paid before the Sub-Registrar, admittedly Annamalai took back the amount, and on the 3rd April 1900, he and Sami Aiyar entered into an arrangment, which purports to be set out in exhibit D. According to it Rs. 610 was paid to Sami Aiyar himself, Rs. 270 to one C. Krishnaswami Aiyar, Rs. 57 into Court, Rs. 1,000 to the present appellant, Chidambaram Chetti, and Rs. 5,838 to a dancing girl named Balamani.

There is no doubt that the sums of Rs. 4,390 and Rs. 1,650 stated to have been paid to the decree-holders were really due, and they entered satisfaction for the same. The Subordinate Judge, in effect, found that the payment to C. Krishnaswami Aiyar was also due, and we think that the weight of evidence, is in favour of the view that the sum of Rs. 1,185 was due, and was paid, to K. Srinivasa Aiyar.

But as regards the remainder (over Rs. 7,000) we agree with the Subordinate Judge that the case set up on behalf of the appellant is fictitious. Rs. 5,838 is said to have been paid to Balamani on account of money borrowed from her by Sami Aiyar.

The sole evidence in support of the plea is the statement of Balamani herself. Her evidence is vague and indefinite and is entirely unsupported by any accounts or vouchers and it is highly improbable in view of the relation existing between them, that she would have lent any money or at all events so larger a sum to Sami Aiyar.

We are equally satisfied that no money was due to Chidambaram. We think that there can be no doubt that the arrangement effected by the assignment, though partly entered into for the purpose of discharging debts really due by Sami Aiyar, was also

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clearly intended to secure a sum of over Rs. 7,000 to the assignor himself or to persons in whom he was interested, but who were not his creditors. Admittedly Sami Aiyar was at that time in pecuniary embarrassment. His only property was the sum to his credit in Original Suit No. 12 of 1899. The assignment therefore operated to screen some 50 per cent. of his assets from being taken by his other creditors. Annamalai admits that he knew of the existence of those other creditors and that they were pressing for payment. On the very day of the alleged arrangement with Sami Aiyar, and on the following day, two of these creditors obtained orders for the attachment before judgment of the sum to the credit of Sami Aiyar in Original Suit No. 12 of 1899, and other attachments were issued soon afterwards. Having regard to the fact that at this time Sami Aiyar, Annamalai and Chidambara Chetti were all paramours of the dancing girl Balamani, and on friendly terms with each other, we cannot doubt that the arrangement was, to the extent we have stated, a device intended to defeat Sami Aiyar's other creditors.

In this view, the next question for decision is whether the assignment to Annamalai is valid as against the respondents.

The property sought, to be assigned, not being immoveable property, section 53 of the Transfer of Property Act has no direct application and we must decide the question by a reference to general principles of justice, equity and good conscience. As observed by the Judicial Committee of the Privy Council in *Corlett* v. *Radcliffe*(1), each case must depend upon its own circumstances, and in all the question is one of fact, whether the transaction was *bonâ fide* or was a contrivance to defraud creditors. It may, however, be stated generally that a deed is void against creditors when the debtor is in a state of insolvency, or when the effect of the deed is to leave the debtor without the means of paying his present debts. If this is the condition of the debtor, or the consequence of his act, it is not sufficient to render a deed valid that it should be made upon good consideration, for as it is said in Twyne's Case(2) "a good consideration does not suffice if it be not also *bonâ fide*." This statement of the law is sufficient to support the conclusion of the Subordinate Judge, that the assignment was invalid. As, however, Mr. Krishnaswami Aiyar,

(1) 14 M.P.C.C., 136, s.b.; 15 Eng. Rep., 257. (2) 3 Co. Rep., 80.

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on behalf of the appellant, strongly contended that the last paragraph of section 53 of the Transfer of Property Act as interpreted by this Court in *Ramasamia Pillai* v. *Adinarayana Pillai*(1), warrants a different view being taken, we will briefly deal with his contention. In effect his contention is that wherever there is any real consideration, however small, for the transfer, the question of intention is immaterial and the transaction must be held to be one entered into in good faith and therefore not invalid as against creditors either under the statute of 13 Elizabeth, c. 5, or under section 53 of the Transfer of Property Act, even though it was in fact intended to delay or defeat creditors and had the intended effect. This contention is, we think, on the face of it unsustainable, for the simple reason that under both enactments good faith as well as consideration is made, in terms, an essential condition of the validity of the transfer. This has been pointed out again and again both in the decisions of the Courts and by the text writers referred to by Mr. Sivaswami Ayyar in his reply for the respondents. *Corlett* v. *Radcliffe*(2) already cited; *Bott* v. *Smith*(3); *In re Johnson Golden* v. *Gillam*(4), *Ex parte Chaplin*; *In re Sinclair*(5) per Fry, L.J., Smith's 'Leading Cases,' eleventh edition, vol. I, pages 16 and 17; May's 'Fraudulent Transfers' (May's 'Fraudulent and Voluntary Dispositions of Property'), page 85; *Ranchhodas Hargovandas* v. *Chunilal Balmukunddas*(6) as regards the passage at page 466 of the case of *Ramasamia Pillai* v. *Adinarayana Pillai*(1), the Judges appear to have merely intended to repeat the language of Thesiger, L.J., in *Ex parte Games*(7), which again refers to *Allen* v. *Bonnett*(8). In neither of these two cases was the statement intended to give an exhaustive explanation of the term *bonâ fide* in connection with such transactions. In both the Judges were dealing with mortgages, and what they said was that, where a mortgage was granted for a sum really due, the transaction could not be impeached except upon the ground that the transaction, though in form a mortgage, was in truth, a trust in favour of the debtor, and thus a mere cloak to secure an advantage to him.

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(1) I.L.R., 20 Mad., 465 at p. 466.
(2) 14 M.P.C.C., 186, s.b.; 15 Eng. Rep., 257.
(3) 21 Beav., 511.
(4) L.R., 20 Ch.D., 392.
(5) L.R., 26 Ch.D., 338.
(6) 5 Bom., Law Reporter, 213.
(7) L.R., 12 Ch.D., 314.
(8) L.R., 5 Ch. A.C., 577.

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In effect, they were referring to the condition of things which was dealt with by Lord Coke in Twyne's Case(1) when he said thus: "If a man be indebted to five several persons in the several sums of 20*l* and hath goods of the value of 20*l*, and makes a gift of all his goods to one of them in satisfaction of his debt, *but there is a trust between them* that the donee shall deal favourably with him in regard of his poor estate, either to permit the donor or some other person for him or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able, this shall not be called *bonâ fide* within the said proviso, for the proviso saith on a good consideration and *bonâ fide*, so a good consideration doth not suffice if it be not also *bonâ fide*."

It is scarcely necessary to add that there is nothing in the statute of Elizabeth or in section 53, Transfer of Property Act, to prevent a creditor giving a preference provided nothing more is done by the transaction either with reference to the transferor or transferee so as to injuriously affect the creditors of the former.

Another argument of Mr. Krishnaswami Ayyar for the appellant was that to the extent of payments made by Annamalai on behalf of Sami Aiyar's creditors, the assignment should be held good, and the appellant should be allowed to execute the decree as if he were a joint creditor with Sami Aiyar. We cannot accede to this argument. The transaction being entirely invalid as against the creditors, we cannot allow it to be treated as partly valid. It is open to the appellant to protect himself by discharging the claims of Sami Aiyar's other creditors, at whose instance the transaction is voidable.

We therefore dismiss both the appeals with costs.

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(1) 3 Co. Rep., 80.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

1906. August 15.

RAMASWAMY AYYAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

MUTHUSAMY AYYAR (DEFENDANT), RESPONDENT.*

Limitation Act XV of 1877, *sch. II, art.* 49—*Cause of action arises when defendant's possession becomes wrongful—Possession by Magistrate is possession for rightful owner.*

Under article 49, schedule II of the Limitation Act, time begins to run from the time when the property is wrongfully taken.

Where property is seized by a Magistrate, the property passes into legal custody and such custody is for the benefit of the rightful owner. Time begins to run against such owner only when by an erroneous order of the Magistrate the property is delivered to some other person and it is so even when such other person had been in wrongful possession previous to the seizure by the Magistrate.

Mudvirapa Kulkarni v. *Fakirapa Kenardi*, (I.L.R., 7 Bom., 427), distinguished.

CLAIM for the recovery with interest of the value of 243 kalams of paddy belonging to the plaintiffs which were ordered to be delivered to the defendant by the Magistrate before whom the defendant had complained against the plaintiffs, claiming such paddy as his own. The order of the Magistrate was passed on the 18th October 1898 and the plaint was presented on the 17th October 1901. The further facts necessary for this report are set out in the judgment.

The Subordinate Judge found that the defendant had wrongfully taken possession of 117 kalams and awarded the plaintiffs the value thereof at Rs. 1–12–0 per kalam with interest.

The District Judge held that time began to run from the date of the criminal complaint in the case of 35 kalams of paddy, as the plaintiffs were deprived of possession on such date by the police and as regards the remaining 82 kalams, from the date when the defendant first took wrongful possession of such paddy, some time before the complaint. He accordingly held that the

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* Second Appeal No. 282 of 1904, presented against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suits Nos. 210 and 324 of 1903, presented against the decree of M.R.Ry. K. Ramachandra Ayyar, Subordinate Judge of Negapatam, in Original Suit No. 4 of 1902.

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plaintiffs' suit filed more than three years after each of the above dates was barred by limitation and dismissed the suit. Plaintiff preferred this second appeal.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for appellants.

The Hon. Mr. *P. S. Sivaswami Ayyar* for respendent.

JUDGMENT.—The facts of this case are as follows:—35 kalams of paddy were in the first plaintiff's house. On a complaint by the defendant, that paddy was taken by the police, and after the termination of the trial instituted on the defendant's complaint was handed over by order of the Magistrate to the defendant, the Magistrate being of opinion that it belonged to him and not to the first plaintiff. The present suit brought within three years from the date of such delivery to the defendant is clearly within time. The possession by the defendant of the property, after delivery by the Magistrate to him, was in point of law wrongful, it being found now that the paddy belonged to the plaintiff. In this case time runs under article 49 of the Limitation Act for three years from the date when the property is wrongfully taken. This suit was brought within the three years prescribed. *Mudvirapa Kulkarni* v. *Fakirapa Kenardi*(1), cited on behalf of the defendant will not apply to a case such as this. The suit was for damages caused by a complaint improperly instituted, in consequence of which the plaintiffs' property was seized by the Magistrate and restored in a damaged condition. The Court held that the damage was the natural consequence of the complaint and the cause of action arose on the date of the complaint or at the latest on the date of the attachment.

The remaining part of the claim relates to 82 kalams of paddy which had been stored in the defendant's house, this was removed by the first plaintiff and during removal was taken by the defendant for the purpose of instituting a charge of theft against the plaintiff: and he preferred the charge the same day and on a search warrant issued by the Magistrate, the property was taken from the custody of a person in whose hands the defendant had lodged it. The trial of the charge preferred ended in the conviction of the accused person, the first plaintiff, and the paddy was by order of the Magistrate handed over to the defendant on the 18th

(1) I.L.R., 7 Bom., 427.

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RAMASWAMY AYYAR v. MUTHUSAMY AYYAR.

October 1898. The present suit being brought within three years of that date must be held to be in time with reference to the provisions of article 49. We are unable to agree in the contention on behalf of the defendant that his taking of possession on the 18th of October 1898 did not give the plaintiff a fresh cause of action. No doubt when the defendant before preferring his complaint deprived the plaintiffs of the possession of the property there was an invasion of the plaintiffs' right. But the subsequent possession under the Magistrate's order cannot be treated as a mere continuation of the original wrong.

When possession was taken by the Magistrate under the warrant, the property passed into legal custody and that custody during its continuance must be held to be for the benefit of the owner *Rajah of Venkatagiri* v. *Isakapalli Subbiah*(1). It follows that, when under the erroneous order of the Magistrate the defendant took possession of the paddy for his own purposes, he was guilty of a conversion which gave to the plaintiffs a cause of action. We therefore modify the decree of the lower Appellate Court by allowing the plaintiffs' claim for 117 kalams. The defendant will pay damages at the rate of Rs. 1–8–0 per kalam and interest at 6 per cent. on the amount awarded from the date of plaint to the date of payment. The defendant will pay the plaintiffs' proportionate costs throughout.

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(1) I.L.R., 26 Mad., 410.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

1906. August 24.

KOONI MEERA SAHIB AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

MAHOMED MEERA SAHIB AND OTHERS (DEFENDANTS NOS. 1, 3, 6 TO 9 AND REPRESENTATIVES OF THE SECOND DEFENDANT), RESPONDENTS.*

Jurisdiction—Subject-matter of suit of mixed spiritual and temporal character—If the two intimately connected, a Court can inquire into the spiritual matter—Right to bury dead is a civil right.

Although Courts in this country have no jurisdiction in suits relating to ritual or religious observance only, the Courts are bound to inquire into questions of religion or ritual which are material for the determination of civil disputes; and when the matter in dispute is of a mixed spiritual and temporal nature, jurisdiction to inquire into the spiritual question will depend upon whether it is so intimately connected with the temporal as to be inseparable from it.

The right of burial is a civil right: and an interference with the right of reciting prayers in connection with such burial is an invasion of the civil right.

Anandrav Bhikaji Phadke v. *Shankar Daji Charya*, (I.L.R., 7 Bom., 323), referred to.

Ram Rao v. *Rustumkhan*, (I.L.R., 26 Bom., 198), referred to.

THE plaintiffs sued for a declaration that they were entitled to have the funeral prayers read over the corpses of their people in front of the mosque, either by themselves, or by other competent men appointed by them, and to obtain a perpetual injunction restraining the defendants from interfering with their exercising such right.

Both the lower Courts dismissed the suit on the ground that it was of a nature not cognisable by Civil Courts.

Plaintiffs appealed.

K. S. Ramaswami Sastri for *P. R. Sundara Ayyar* for appellants.

The Hon. Mr. *P. S. Sivaswami Ayyar* for first, second and seventh to ninth respondents.

JUDGMENT.—This case has been disposed of on the pleadings and we take the material averments in the plaint to be that the

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* Second Appeal No. 239 of 1906, presented against the decree of W. W. Phillips, Esq., District Judge of Tinnevelly, in Appeal Suit No 16 of 1905, presented against the decree of M.R.Ry. T. Sami Ayyar, District Munsif of Ambasamudram, in Original Suit No. 525 of 1903.

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plaintiffs who are Shafi Muhammadans resident in Tenkasi have a right to bury their deceased relations in the mosque mentioned in the plaint and situated in the same town: that in the usual course of burial the body is taken into the compound of the mosque to the enclosure in front of the prayer hall, then certain prayers are said over the body by the relations of the deceased or persons selected by them, and the body is afterwards removed to the place of sepulture and interred; that the first defendant who claims to be entitled to the office of Labbai denies the right of the deceased's relations or their delegates to recite the prayers, and asserts an exclusive right to do so in himself.

The lower Courts have dismissed the suit on the ground that it is one relating to mere rituals which it is not competent to the Civil Courts to entertain.

That in suits relating to ritual or religious observance only the Civil Courts in this country have no jurisdiction is undeniable. On the other hand, it is equally clear that Courts of Justice are bound to enquire into questions of religion or ritual which are material for the determination of civil rights in dispute between the parties (*Anandrav Bhikaji Phadke* v. *Shankar Daji Charya*(1)) and the Privy Council case there cited.

When the matter is of a mixed spiritual and temporal character, the question will depend upon the nature of the connection between the facts, and will be, in fact, whether the spiritual question is so intimately connected with the temporal as to be inseparable from it. If such is the case it would be the duty of the Courts in trying the civil disputes to enquire into the spiritual matter thus intimately related.

Turning to the present case, there can be no doubt that the right of burial is a civil right (*Ram Rao* v. *Rustumkhan*(2)) and if, as alleged on behalf of the plaintiffs, the recitation of prayer at a particular spot in the mosque is a necessary part of the burial, and the plaintiffs are hindered from exercising their right in accordance with the law and usage of the community to which they belong, the interference by the defendants with reference to the recital of the prayer to the extent to which they claim the right to interfere, would, in effect, be an invasion of their right.

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(1) I.L.R., 7 Bom., 323. (2) I.L.R., 26 Bom., 198.

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KOONI MEERA SAHIB v. MAHOMED MEERA SAHIB.

We are unable to accede to Mr. Sivaswami Ayyar's suggestion that as the defendants' objections are limited to that part of the burial ceremony which consists in the recital of prayers, such denial would not constitute an infringement of the civil right, and that the dispute relates only to a matter of ritual.

In our opinion, the matter cannot reasonably be split up in this manner. We think the plaintiffs were entitled to go into the question whether, according to the law and customs governing their community, their right of burial was exercisable in the way alleged by them.

From the plaint it does not appear how the dispute between the contending factions arose on the present occasion. There is no statement that in any particular instance the defendants interfered to prevent a burial in the manner alleged to be customary. In such circumstances, it would be for the Courts to consider whether the declaration sought ought to be given, with reference to the discretion vested in them in this regard by the Specific Relief Act, but for the order of the Magistrate passed under section 147 of the Code of Criminal Procedure on the 27th July 1903. By this order the plaintiffs were restrained from employing their own priests for performing funeral ceremonies inside the mosque compound until they should obtain the order of a competent Court entitling them to do so. So long as the order continues in force, it would prevent the plaintiffs from the exercise of their right of burial according to the alleged usage. A determination of the matter by the Court has therefore become imperative.

We must, therefore, set aside the decrees of the Courts below and remand the suit for disposal on the merits, such issues being raised as may be found necessary. Costs will abide and follow the result.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

1906.
April 19, 20.
July 18.

CHINGACHAM VITIL SANKARAN NAIR (PLAINTIFF),
APPELLANT,

v.

CHINGACHAM VITIL GOPALA MENON AND OTHERS
(DEFENDANTS), RESPONDENTS.*

Court Fees Act VII of 1870, *s.* 7, *para. IV, cl.* (c)—*Suit for declaring invalidity of document, which plaintiff is not bound to have set aside is not a suit for declaration and consequential relief within section—Jurisdiction—Rule* 2 *of rules under section* 9 *of Suits Valuation Act.*

In order to determine whether a suit falls under section 7, paragraph IV, clause (c) of the Court Fees Act, the substance of the plaint and not the words which the plaintiff chooses to use, must be considered.

A person may rely on the invalidity of a void instrument as against himself without suing for its cancellation; and a suit by him for declaring the invalidity of such instrument will not be a suit for declaration and consequential relief under section 7, paragraph IV, clause (c) of the Court Fees Act. It will be otherwise where the party cannot impeach the arrangement effected by the deed without having it cancelled.

A transaction by the Karnavan of a Tarward is void against members not consenting thereto, if it is in excess of his powers as such Karnavan.

In declaratory suits where no consequential relief is prayed, the value for purposes of jurisdiction is the value of the property likely to be effected by the declaration, and rule 2 of the Rules of the High Court of 26th February 1903 does not apply to such cases.

THE plaintiff and the defendants were members of a Tarward, of which the first defendant was the Karnavan. The suit was instituted for a declaration that a certain Karar executed by the first defendant and some other members of the Tarward on 15th November 1900 was not binding on the plaintiff or on the family properties. The prayer and the valuation for jurisdiction in the plaint were as follows :—

It is prayed that a decree may be passed (*a*) declaring that the Karar executed on 30th Tulam 1076 (15th November 1900) regarding the conduct, etc., of the family of plaintiff and defendants, and registered as No. 2059 of 1900, is not binding either

* Civil Miscellaneous Appeal No. 98 of 1905, presented the orders of M.R.Ry. S. Raghunathaiya, Subordinate Judge of South Malabar at Palghat, dated the 15th day of February and 2nd day of March 1905, in Original Suit No. 34 of 1904.

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on the plaintiff or on the family properties, and is invalid; (*b*) charging the costs on defendants Nos. 1 and 2 or on such of the defendants as may be found liable therefor; and (*c*) granting other reliefs which may be found necessary considering the nature of this case.

CHINGACHAM VITIL SANKARAN NAIR *v.* CHINGACHAM VITIL GOPALA MENON.

Jurisdiction Valuation.	RS.
Five times Rs. 400 approximate amount of revenue on the Tarward properties	2,000
Approximate value of the jewels and vessels belonging to the Tarward	8,000
Jenmam value of parambas bearing no assessment	500
Approximate value of buildings, tanks, etc. ...	6,000
Total ...	16,500
Court-fee for declaration	10

The defendants objected to the Court-fee paid and to the jurisdictional valuation.

The Subordinate Judge held that the plaint ought to bear an *ad valorem* stamp under section 7, paragraph IV, clause (c) of the Court Fees Act and that the value of the suit was within the jurisdiction of a Munsif's Court and directed the return of the plaint.

The material portion of his judgment was as follows:—

"Thus, the suit is to vindicate the rights of the plaintiff as a member of his Tarward to enjoy the entire Tarward property jointly with the other members, and to succeed to the management when the plaintiff should happen to become the most senior male member in the Tarward. Accordingly, it is a suit for the enforcement of plaintiff's right as a member of a Tarward governed by Marumakkatayam Law. It is a suit falling under section 7, paragraph IV, clause (c) of the Court Fees Act, *i.e.*, a suit for a declaratory decree where consequential relief is prayed, the consequential relief being the right to share in the joint family property. The subject matter of such a suit should, for the purposes of the Court Fees Act and Suits Valuation Act, be valued at the amount at which, if the whole of the Tarward property were, by the consent of all, equally divided among all the members (including the plaintiff) of the Tarward, the plaintiff's share would be

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valued with reference to the valuation of the suit under Court Fees Act, 1870, if the suit were one brought by a stranger for the recovery of the whole property, moveable and immoveable, possessed by the Tarward (*vide* rule 2 among the rules framed by the High Court under section 9 of the Suit Valuation Act, 1887)."

"Now the entire property of the Tarward, moveable and immoveable, has been valued by the plaintiff at Rs. 16,500, which valuation is not contended to be otherwise than *bonâ fide.* Accordingly, it shall be accepted. The Tarward consists of 13 members including the plaintiff, and so plaintiff's share must be valued at 1/13 of Rs. 16,500 or Rs. 1,299-3-8. The plaintiff shall pay the proper Court-fee on this sum within a week, when the plaint will be returned to the plaintiff for being presented in the proper Court."

Plaintiff appealed to the High Court.

V. Krishnaswami Ayyar for appellant.

T. R. Ramachandra Ayyar for respondent.

JUDGMENT—SUBRAHMANIA AYYAR, J.—I agree with Mr. V. Krishnaswami Ayyar's contention that the present is not a case falling within section 7, paragraph IV, clause (c) of the Court Fees Act, viz., one for a declaratory decree where consequential relief is prayed, but is one for a mere declaration only, inasmuch as all that the plaintiff asks is for a declaration that his right as a member of the Tarward is unaffected by the Karar of the 15th November 1900 entered into during his minority by the adult members of the family including the Karnavan. No doubt the question whether section 7, paragraph IV, clause (c) applies or not must depend on the substance of the claim and not on the mere words which a plaintiff may choose to introduce into his plaint with reference to it. In the present case, if, in point of law, it was incumbent on the plaintiff to get the Karar cancelled and put out of his way as a preliminary to his questioning the arrangements thereby made, it might be proper to hold that the plaint is virtually one for consequential relief also; but such is not the plaintiff's position. Of course he was not himself a party to the Karar. Whether it is binding on him or not depends on the considerations for, and the circumstances in, which the actual parties to the instrument came to an agreement among themselves matter. In other words the case is one in which the

CHINGACHAM VITIL SANKARAN NAIR v. CHINGACHAM VITIL GOPALA MENON.

efficacy of the transaction has to be decided with reference to whether it was within the power of the Kàrnavan and others according to the personal law of themselves and of the plaintiff to affect the rights of the latter by a consent and action taken by themselves independently of him. The right view in such instances is that the transaction would bind members who are not actually consenting parties, if the considerations, if any, which pass, and the other attendant circumstances, constituted it a valid exercise of the power of the Karnavan and others, but otherwise it is altogether void. Though a transaction which is void may under certain circumstances be cancelled by a Court at the instance of a person not party to it, on the ground that it would throw a cloud on his title, it is of course not true that such a person must get rid of the transaction by having it actually cancelled in order to rely on its invalidity as against him. In the view that the present suit is, alike in form and in substance, but a suit for a mere declaration, it follows that no portion of rule No. 2 of the Rules of this Court of the 26th February 1903, relied on on behalf of the respondent, has any application to this case. That rule must be confined to cases of the precise description provided for by section 7, paragraph IV, clause (c) with reference to which it is framed, viz., suits to obtain a declaratory decree or order where consequential relief is prayed.

The order of the Subordinate Judge returning the plaint for presentation to a Court of competent Jurisdiction cannot be sustained, inasmuch as, he has jurisdiction over the suit having regard to the value of the property likely to be affected by the declaration sought. The order is, therefore, set aside. The plaint will be restored to his file, and proceeded with according to law. Costs will abide and follow the result.

MOORE, J.—I concur.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1906. August 22, 28.

KESAVALOO NAIDU (PETITIONER), APPELLANT,

v.

MURUGAPPA MUDALI AND ANOTHER (COUNTER-PETITIONERS), RESPONDENTS.*

Indian Companies Act VI of 1882, *ss.* 169, 177, 185, 189, 191—*Order refusing supervision order under section* 191 *appealable under section* 169—*Liquidator—Duties of—Where liquidators appointed under section* 185, *misbehave, supervision order must be made by Court on the motion of creditors.*

The right of appeal conferred by section 169 of the Indian Companies Act extends to all orders or decisions made or given in the matter of the winding up of a company whether the winding up be compulsory, voluntary, or under supervision. An order refusing to make a supervision order under section 191 is appealable under section 169.

The duties imposed upon liquidators by section 177 of the Act cannot be delegated by them to others. Liquidators appointed by the Company under section 177 can be removed only by the Court under section 185, and are not subject to the control of the company in the performance of their duties.

Where the liquidators on insufficient grounds refuse to deal with the claim of a creditor on its legal merits, the Court is bound to grant a supervision order on the application of such creditor.

PETITION under section 189 of the Indian Companies Act to have the Wallajabad Nidhi wound up under the supervision of the Court.

The petitioner was a creditor of the Nidhi.

The lower Court dismissed the petition.

Petitioner preferred this appeal.

The Hon. Mr. *P. S. Sivaswami Ayyar* for appellant.

B. Panchapagesa Sastri and *V. Sankaranarayana Sastri* for respondents.

JUDGMENT.—This is an appeal from an order of the District Judge rejecting a petition presented under section 189 of the Indian Companies Act by a creditor of a company, now in voluntary liquidation, praying that the winding up may be continued under the supervision of the Court. A preliminary objection has been

* Civil Miscellaneous Appeal No. 174 of 1905, presented against the order of M.R.Ry. T. M. Swaminatha Ayyar, District Judge of Chingleput, dated 18th September 1905, in Original Petition No. 110 of 1905.

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taken that, under section 169, appeals only lie from orders or decisions made or given in the matter of the winding up of a company by the Court, and that an order refusing to make a supervision order under section 191 is not an order made in the matter of the winding up of the company by the Court We are, however, of opinion that this construction of the section is erroneous, and that an appeal is given from any order or decision made by the Court in the matter of the winding up of a company, whether the winding up be compulsory, voluntary or under supervision. The language of the first part of section 169 is taken from section 124 of the Companies Act, 1882, substituting the words "by the Court" for "by any Court having jurisdiction under this Act." The right of appeal conferred by section 124 clearly extends to all orders or decisions in the matter of the winding up of a company, and the substitution of the more compendious words "by the Court" was not, in our opinion, intended to cut down the right of appeal to cases in which a company is being wound up compulsorily by the Court. We may further observe that the scope of the other sections in this part of the Act beginning with section 166 is general, and that there does not seem to be any reason why the legislature should have desired to restrict appeals in the manner contended for.

Coming now to the merits, it is necessary to recapitulate briefly the exceedingly irregular proceedings in the voluntary winding up which have led to this appeal. The present petitioner was one of the two liquidators originally appointed in 1900 and acted for some years in the winding up with his colleague. They then quarrelled, and, eventually in 1904, referred the matter in dispute between them to two arbitrators. The terms of the reference are disputed and it is unnecessary to determine them. The arbitrators then took on themselves to make final arrangements for the winding up of the company and purported to remove the old liquidators and appoint the present counter-petitioners as liquidators, and their proceedings are said to have been approved, first at a meeting of the directors in June 1904, and then by a general meeting of the company on August 1st, 1904. In our opinion all these proceedings of the arbitrators, the directors and the company were *ultra vires* and illegal. The original liquidators were appointed by the company as required by section 177 (*b*) for the purpose of winding up the affairs of the company and distributing

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its assets, and were bound (section 177 (j)) to pay the debts of the company and to adjust the rights of the contributors among themselves. These statutory duties they could not delegate to arbitrators or any one else. Once appointed they could not be removed by the company, but only by the Court under section 185 on due cause shown. In the discharge of their duties they were not subject to the control of the company, except in so far as the sanction of an extraordinary resolution of the company is required in the case of arrangements with the creditors or debtors of the company made by the liquidators under the supervision of the Court in a voluntary winding up under sections 201 and 202 as to which there is no question here. Under these circumstances the proceedings of the arbitrators, directors, and the company, were *ultra vires* and illegal, and the Registrar of Joint Stock Companies was well warranted in refusing to recognize their proceedings or the new liquidators appointed by them. The new liquidators thereupon presented a petition to the Court, dated the 19th September 1904, praying that the winding up might be completed under the supervision of the Court and that they might be appointed or confirmed as liquidators. The present petitioner presented a counter-petition, dated the 2nd December 1904, questioning the validity of all that had been done since the appointment of the arbitrators including the appointment of the new liquidators, and the Court after convening a meeting to ascertain the wishes of the share-holders and creditors refused to make a supervision order, but confirmed the new liquidators. The petitioner did not appeal from this order, and he does not in his petition question the validity of the appointment of the new liquidators. We therefore think that it must be taken to have been properly made by the Court under section 185. Assuming, however, that the new liquidators, the respondents here, were validly appointed, the petitioner contends that their subsequent action has been prejudicial to his rights as a creditor and has been such as call for the passing of a supervision order. On their appointment by the Court the new liquidators were bound to take up the winding up at the point where the old liquidators had left off ignoring all that the arbitrators had done *ultra vires*. It appears, however, from the counter-petition filed by the new liquidators in the present case that they entirely misconceived their duties, and instead of proceeding to deal themselves with the questions arising in the winding up they called a meeting of the

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company to consider what further steps should be taken in the matter of the winding up. The general meeting, they state, was dead against reopening the arrangements made by the directors and confirmed by a general meeting of the company, referring, apparently, to the meetings held in June and August 1904, and they are therefore unable to yield to the selfish request of the petitioner that his case should be reopened. The proceedings of the arbitrators, directors and the general meeting in 1904 were, as already pointed out, illegal and *ultra vires*, and cannot be relied on by the present liquidators as a reason for refusing to deal with the present petitioner's claim, as a creditor, on its legal merits; and the District Judge was wrong in refusing the present petition for a supervision order on the ground that the proceedings of the arbitrators had been approved by a general meeting, as the general meeting had no legal competency in the matter. Without expressing any opinion as to the petitioner's claim, we think that the refusal of the liquidators to consider it, and deal with it, on the merits, coupled with the great irregularities and disregard of statutory provisions which have characterized this voluntary winding up, make it desirable that a supervision order should be made; and we reverse the order of the lower Court and direct that the winding up of the company shall be continued under the supervision of the Court. We accordingly allow the appeal with costs, but, as the new liquidators in the action which they took were guided by the wishes of the company, we direct that the appellant's and respondents' costs in both Courts be paid out of the company's funds.

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APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Wallis.

1906. August 16.

KUMARETTA SERVAIGARAN *alias* CHINNASAMI SERVAIGARAN, MINOR, BY SIVI AMMAL (SECOND DEFENDANT), APPELLANT,

v.

SABAPATHY CHETTIAR (PLAINTIFF), RESPONDENT.*

Civil Procedure Code Act XIV of 1882, s. 244 (c)—Objection to validity of decree cannot be raised in execution proceedings.

An objection by the defendant in a mortgage suit to the sale of properties directed to be sold by the decree in such suit, on the ground that such property is not liable for the decree is not an objection relating to the execution, discharge or satisfaction of the decree within the meaning of section 244 (c) of the Code of Civil Procedure but one questioning the validity of the decree itself and cannot be entertained in execution proceedings.

THE plaintiff-respondent obtained a decree in Original Suit No. 68 of 1897 on a mortgage bond executed by the deceased father of defendants Nos. 1 and 2. The decree directed the sale of the mortgaged properties in default of payment. The decree amount not having been paid, the plaintiff applied for an order absolute under section 89 of the Transfer of Property Act. The second defendant objected on the ground that the properties were not liable for the decree.

The lower Court passed the following order :—

"The second defendant now objects to the execution of the decree by sale of property, on the ground that, the plaintiff's mortgage was not obtained from the true owner of the property; that after the passing of the decree he (second defendant) has been adopted by the true owner and that in that capacity he has the right to object to the execution of the decree. What the second defendant really contends is that the mortgage on which the decree has been passed is not binding on the property, and no decree for sale of the property could be passed. This, I do not think, is a question relating to the execution, discharge or satisfaction of the decree,

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* Civil Miscellaneous Appeal No. 156 of 1905, presented against the order of M.R.Ry. V. Kelu Eradi, Subordinate Judge of Tuticorin, in Miscellaneous Petition No. 106 of 1905, in Original Suit No. 68 of 1897 on the file of the Subordinate Judge's Court of Tinnevelly.

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which directs the sale of property. I overrule the objection and make the decree absolute."

KUMARETTA SERVAIGARAN v. SABAPATHY CHETTIAR.

Against this order the second defendant appealed.

T. V. Seshagiri Ayyar for appellant.

K. Srinivasa Ayyangar for respondent.

JUDGMENT.—The appellant was a party defendant in a suit in which a mortgage decree was passed ordering the sale of specified mortgaged property. On an application to make the decree absolute, and for an order for the sale of the property, the appellant seeks to stop the sale contending that the decree which has been passed against him is not binding on the property on the ground that, since the decree, he has been adopted into the family of another person to whom the property belongs. The Subordinate Judge overruled his objection and made the order asked for. We think he was clearly right. The objection taken by the appellant is that, though the decree to which he is a party is a decree for sale of specified immoveable property, he is entitled to object, in execution, to the sale of the property. In other words the objection is an objection to the decree itself and not to the execution, discharge or satisfaction of the decree. Unless the objection relates to the execution, discharge or satisfaction of the decree it is not within section 244 (*e*), Civil Procedure Code, and we think this case is not within it. This is the view adopted in *Sanwal Das* v. *Bismillah Begam*(1), *Liladhar* v. *Chaturbhuj*(2), *Akikunnissa Bibee* v. *Roop Lal Das*(3), and *Khetrapal Singh Roy* v. *Shyama Prosad Barman*(4). In the case cited in opposition *Kuriyali* v. *Mayan*(5), the present question was not raised or apparently considered, and we do not think that it intends to lay down the proposition that it is open to a party to the suit to question the decree in execution.

We, therefore, dismiss the appeal with costs.

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(1) I.L.R., 19 All., 480.
(2) I.L.R., 21 All., 277.
(3) I.L.R., 25 Calc., 133.
(4) I.L.R., 32 Calc., 265.
(5) I.L.R., 7 Mad., 255.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Wallis.

1906.
August 29.

SYED HUSSAIN SAIB ROWTHEN (COUNTER-PETITIONER—THIRD DEFENDANT), APPELLANT,

v.

RAJAGOPALA MUDALIAR (PETITIONER-PLAINTIFF), RESPONDENT.*

Limitation Act XV of 1877, *sched. II, art.* 179—*Application in accordance with law.*

A decree passed in a redemption suit directed "that the plaintiff do recover possession on payment of Rs. 865":

Held, that the payment of the amount was a condition precedent to the making of an order for the delivery of the property but not to the making of an application for a conditional order, and that an application for execution of the decree without paying the amount was an application 'in accordance with law within the meaning of article 179, schedule II of the Limitation Act.

THE facts necessary for this report are fully set out in the judgment of the lower Appellate Court which is as follows:—

"I think that this appeal must be allowed. The suit was for redemption of a mortgage and the decree to be executed (that of the Appellate Court) says that the plaintiff is to recover possession of the property 'on payment to the third defendant of Rs. 865.' The time within which payment is to be made is not fixed by the decree. The District Munsif finds that the decree is capable of execution and I have no doubt that this finding is right. But he finds that the decree-holder's application for execution made on 23rd June 1904 is barred, because two previous applications (made within the period of limitation prescribed by article 170 of the second schedule to the Limitation Act) were not preceded or accompanied by payment of the mortgage money, and this finding is, I think, wrong."

"The decree was passed on 31st December 1895. The first application for execution was made on 3rd December 1898 and was dismissed on 17th December 1898 on the ground that the decree-holder had not paid Rs. 865 into Court. The second

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* Civil Miscellaneous Second Appeal No. 3 of 1906, presented against the decree of G. F. T. Power, Esq., District Judge of Coimbatore, in Appeal Suit No. 1 of 1905, presented against the order of M.R.Ry. R. Annasami Ayyar, District Munsif of Karur, in Execution Petition No. 437 of 1904 (Original Suit No. 29 of 1903).

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application was made on 29th November 1901 and was dismissed on 7th December 1901, the order then passed being 'Amount not deposited as directed by decree. Petition is dismissed.' The decree does not direct that Rs. 865 shall be deposited before application for execution is made, but merely directs 'that the plaintiff do recover possession of the property (except item 5 mentioned below) on payment by him to third defendant of Rs. 865.' The District Munsif says that 'payment is under the terms of the decree, a condition precedent to the maintainability of an application to execute the decree,' and refers to the decisions of the Bombay High Court in *Gan Savant Bal Savant* v. *Narayan Dhond Savant*(1) and *Maloji* v. *Sagaji*(2) as authority for holding that the plaintiff was bound to pay Rs. 865 into Court, or to the third defendant, within three years from the date of the decree, and that as he did not do this, he cannot execute the decree now. This, however, is a mistake as was explained by the same High Court in a later case precisely similar to the present case in *Narayan Govind* v. *Anandram Kojiram*(3). In that case, as in this case, previous applications had been dismissed because the mortgage money was not paid, but it was held that the decree-holder could pay the money and execute the decree more than three years after the date of the decree provided only that the previous applications were made to the proper Court within the period of limitation allowed by article 179. The previous applications in this case were so made. The order of the District Munsif is set aside, and he will replace the decree-holder's application on his file and dispose of it according to law."

Against this order the third defendant appealed.

Mr. *E. R. Osborne* for appellant.

T. R. Venkatarama Sastri for the Hon. Mr. *P. S. Sivaswami Ayyar* for respondent.

JUDGMENT.—The only ground upon which it could be said that the applications of 1898 and 1901 were not applications in accordance with law is that the payment of the mortgage money either into Court or to the third defendant was a condition precedent to the making of the applications. The payment of the mortgage money is no doubt a condition precedent to the

(1) I.L.R., 7 Bom., 467. (2) I.L.R., 13 Bom., 567.
(3) I.L.R., 16 Bom., 480.

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making of an order for the delivery of the property, but it is not, in our view, a condition precedent to the making of an application for a conditional order. We think the applications were in accordance with law and we agree with the decision of the Bombay High Court in *Narayan Govind* v. *Anandram Kojiram*(1).

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Wallis.

1906. August 13, 17.

CHERUVATH THALANGAL BAPU (PETITIONER AND DECREE-HOLDER), APPELLANT,

v.

NERATH THALANGAN KANARAN AND OTHERS (COUNTER-PETITIONERS NOS. 1 AND 3 TO 5 AND JUDGMENT-DEBTORS), RESPONDENTS.*

Limitation Act XV of 1877, *sched. II, art.* 179 (5)—*Date of "issue of notice" means date of actual issue of notice and not date of order directing issue.*

The date of "issue of notice" from which time is to run under clause 5 of article 179 of schedule II of the Limitation Act is not the date on which the issue of the notice is ordered by the Court but the date of the actual issue of the notice.

Govind v. *Dada*, (I.L.R., 28 Bom., 416), dissented from.

THE appeal arose out of proceedings in execution of the decree in Original Suit No. 317 of 1898. The decree was passed on the 23rd January 1899; the last execution petition was presented on the 2nd January 1902; an order directing notice to issue under section 248 of the Code of Civil Procedure was passed on the 3rd January 1902 and the notice was drawn up and signed on the 7th January 1902. The present application for execution was presented on the 7th January 1905 by the decree-holder (appellant). Both the lower Courts held on the authority of *Govind* v. *Dada*(2), that time began to run from the 3rd

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(1) I.L.R., 16 Bom., 480. (2) I.L.R., 28 Bom., 416.

* Civil Miscellaneous Second Appeal No. 78 of 1905, presented against the order of L. G. Moore, Esq., District Judge of North Malabar, in Appeal Suit No. 182 of 1905, presented against the order of M.R.Ry. M. R. Kelappan, District Munsif of Quilandy, in Execution Petition No. 37 of 1905, in Original Suit No. 317 of 1898.

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CHERUVATH THALANGAL BAPU *v.* NERATH THALANGAN KANARAN.

January 1902 and that the application was barred under article 179 (5) of schedule II of the Limitation Act.

The decree-holder appealed.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for appellant.

K. R. Subrahmania Sastri for respondents.

JUDGMENT.—Under clause 5 of article 179 of the Limitation Act time begins to run from the date of issuing a notice under section 248 of the Code of Civil Procedure, but there has been a difference of opinion in the other High Courts as to what should be considered the date of issuing notice, and the point does not appear to have as yet arisen in this Court. In *Hari Ganesh* v. *Yamunabai*(1) where the Court had ordered notice to issue but no notice had in fact issued because batta had not been paid, it was held that time did not begin to run from the date of the order of the Court directing notice to issue in that particular case, as the clause only applies "where the notice next hereinafter mentioned has been issued," and here it had not in fact been issued. The Court however proceeded to observe that it might be that where the notice had been issued the date of issue would be the date on which the issue was ordered by the Court, as had been ruled in a case reported in the Allahabad Weekly notes (*Udit Narain* v. *Rampartab Singh*(2)). If, however, the order directing notice to issue does not of itself constitute an issue of notice within the meaning of the first part of the clause we do not see how it can properly be taken as an issuing of notice within the meaning of the second part of the clause, for the purpose of fixing the date of issuing the notice, as the words "issue of notice" must have the same meaning assigned to them in both parts of the clause. The Bombay High Court, however, without questioning the ruling in *Hari Ganesh* v. *Yamunabai*(1) ruled *obiter* in *Damodar* v. *Sonaji*(3) and expressly in *Govind* v. *Dada*(4) that the date of issuing notice in the second part of the clause is the date of the order directing issue.

On the other hand, the Calcutta High Court has held in *Kadaressur Sen Babor* v. *Mohin Chandra Chakravarti*(5) and again in the present year in *Ratan Chand Aswal* v. *Deb Nath Barna*(6) that time begins to run from the date of the actual issue of the notice,

(1) I.L.R., 23 Bom., 35.
(2) (1881) All., W.N., 147.
(3) I.L.R., 27 Bom., 622.
(4) I.L.R., 28 Bom., 416.
(5) 6 Calc. W.N., 656.
(6) 10 Calc. W.N., 303.

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though, in the latter case, Pargiter, J., expressed some doubt in defence of the Bombay rulings. In this conflict of authority we are on the whole of opinion that the Calcutta view is correct and should be followed. If the Legislature had intended that time should run from the date of the order directing notice to issue instead of from the date of actual issue nothing would have been easier than to say so, as in other articles, such as, in articles 160-A, 162 and 173. It is said, however, that the order directing notice is a judicial act and the actual issue of notice is a ministerial act. Even so, we know of no principle of construction, and have not been referred to any which would authorise us to treat the date of the order directing notice as the date of issuing the notice, whereas the actual issue of the notice does not usually take place for some days after the order directing issue. To so hold would, in our opinion, be to resort to a legal fiction, and this we are not authorized to do. In the present case the notice admittedly was actually issued after 7th January and the present petition therefore is not barred.

We overrule the judgment of the Courts below and remand the case to the Munsif's Court for disposal according to law, and allow the appeal with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Wallis.

1906. August 14.

PERIANAN CHETTI (PLAINTIFF-PETITIONER), APPELLANT,

v.

NAGAPPA MUDALIAR (DEFENDANT-COUNTER-PETITIONER), RESPONDENT.*

Court Fees Act VII of 1870, *s. II—Does not contemplate the fixing by the decree of a time for payment of extra Court-fees—Where Court fixed such time, payment within such time no condition precedent to execution.*

It is not intended by the first part of section 11 of the Court Fees Act that the Court should fix a time for the payment of the extra Court-fee in respect of

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* Civil Miscellaneous Second Appeal No. 94 of 1905, presented against the decree of J. Hewetson, Esq., District Judge of Madura, in Appeal Suit No. 13 of 1905, presented against the order of M.R.Ry. M. C. Parthasarathy Ayyangar, District Munsif of Tirumangalam, in Execution Petition No. 472 of 1904 (Original Suit No. 199 of 1902).

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meene profits subsequent to the institution of the suit but that execution in respect of such profits should be stayed till such payment is made. Where the Court by its decree directs the payment of such Court-fees within a fixed time, such direction is no part of the decree and execution of the decree is not conditional on payment within the time so fixed.

PERIANAN CHETTI *v.* NAGAPPA MUDALIAR.

THIS appeal arose out of proceedings in execution of the decree in Original Suit No. 199 of 1902 on the file of the District Munsif of Tirumangalam.

The material portions of the decree were as follows :—

"This Court doth order and decree that the plaintiff do recover from defendant rent at Rs. 2-4-0 per mensem from Plava, Chithirai 13th April 1901) up to date, viz., Rs. 89-12-4 and proportionate costs Rs. 100-5-6, and this Court doth further order and decree that plaintiff do pay Court-fee Rs. 4-14-0 on the subsequent rent awarded to him after plaint within 9th September 1904."

The plaintiff did not pay the Court-fee within the time fixed and applied for execution on the 7th December 1904. Being met by the objection that he could not execute the decree as the additional Court-fee had not been paid within the time fixed by the decree, he applied for an extension of time which was granted by the Munsif, and an order was passed granting leave to execute the decree.

On appeal the District Judge held that the Munsif had no power to extend the time and dismissed the application for execution.

Plaintiff appealed to the High Court.

K. Srinivasa Ayyangar for *S. Srinivasa Ayyangar* for appellant.

Mr. *J. C. Adam* for respondent.

JUDGMENT.—This is an appeal from an order of the District Judge reversing the order of the Munsif allowing an application for extension of time to pay extra fee before execution as directed in a decree, and allowing execution.

The original suit was for possession and rent of premises and stamp for the value of rent up to date of the plaint only was paid. In the course of the proceedings possession of the premises was given to the plaintiff, and a decree was passed ultimately, for the rent up to the time the premises were delivered, a fixed sum, and ascertained costs, and at the end of the decree the words following were added : "And this Court doth further order and decree that plaintiff do pay Court-fee Rs. 4-14-0 on the

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PERIANAN CHETTI v. NAGAPPA MUDALIAR.

subsequent rent awarded to him after plaint within 9th September 1904." This fee the plaintiff did not pay within the time named. When therefore he sought execution of the decree it was objected that he had not paid the Court-fee as ordered. Thereupon he applied for an extension of time to pay the fee and in the Munsif's Court time was given him and he paid the fee. On appeal the District Judge held that there was no power to extend the time and he reversed the order of the Munsif and dismissed the plaintiff's application.

The real question is whether the direction regarding payment of the Court-fee set forth in the concluding part of the decree forms any part of the decree so as to necessitate the amendment of the decree before the time limited can be extended.

We are of opinion that the words in question do not form any part of the decree and that no amendment of the decree is necessary to enable the Court to extend the time.

Apparently, it was assumed that the latter part of section 11 of the Court Fees Act applied and therefore a time was named within which the extra Court-fee should be paid; but this is clearly a mistake. If any part of that section applies it is the first part of it, and the intention of that part of the section is not that a time should be fixed for the payment of the extra Court-fee but that execution should be stayed until the extra Court-fee, payable, is paid. The latter part of the decree is, in our opinion, mere surplusage, and the Court had power to permit execution of the decree on payment of the extra fee as intended by section 11 of the Court Fees Act. Further, the clause in question does not affect the respondent, and the decree does not make execution of it against the respondent conditional upon the payment of the extra Court-fee within the time named, by the plaintiff.

We therefore allow the appeal, set aside the order of the District Judge and restore that of the Munsif with costs in this and in the lower Appellate Court.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar.

BOJA SELLAPPA REDDY (PLAINTIFF), PETITIONER,

1906.
July 25.
August 10.

v.

VRIDHACHALA REDDY (DEFENDANT),
RESPONDENT.*

Contract Act IX of 1872, s. 69—Money voluntarily paid cannot be recovered back unless the party for whom such payment is made is bound to pay it—Revenue Recovery Act II of 1864, s. 35—Applies only where party paying is tenant, mortgagor, or incumbrancer—Unregistered owner not bound to pay the revenue.

An action to recover money paid is not maintainable under section 69 of the Indian Contract Act, unless the person from whom it is sought to be recovered was bound to pay it.

On this point the law under section 69 of the Indian Contract Act is the same as the English Law.

Bonner v. Tottenham and Edmonton Permanent Investment Building Society (1899, 1 Q.B., 161), referred to.

The revenue due on land owned by one who is not the registered holder is not money which such owner is bound to pay under the Revenue Recovery Act, though it may be to his interest to do so, and the registered holder voluntarily paying such revenue cannot recover it under section 69 of the Contract Act. Neither can he recover it under section 35 of the Revenue Recovery Act unless he is a tenant, mortgagor or incumbrancer of such land.

SUIT by the plaintiff to recover Rs. 45 and odd, being the amount of revenue paid by him in respect of lands of which he was the registered holder, but which were actually owned and enjoyed by the defendant. This amount was paid, voluntarily, by the plaintiff during the pendency of a suit which he had instituted against the defendant for the recovery of the lands as belonging to him, which suit was subsequently dismissed. The defendant had paid the kist both before and subsequent to such suit. The plaintiff had applied to the Revenue authorities to collect the kist from himself, and not from the defendant, and the kist was paid, without the issue of any coercive process, by the plaintiff in accordance with orders passed on his own application.

* Civil Revision Petition No. 302 of 1905 presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of M.R.Ry. T. Srinivasa Ayyangar, District Munsif of Kulittalai, in Small Cause Suit No. 1113 of 1904.

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Further facts are set out in the finding of the lower Court. The District Munsif dismissed the suit.

Plaintiff preferred this civil revision petition.

T. V. Muthukrishna Ayyar for petitioner.

T. V. Seshagiri Ayyar for respondent.

ORDER.—"The District Munsif in finding that the payment was voluntarily does so not upon any evidence taken in the case. I direct the Munsif to receive evidence that either party may adduce, and submit findings upon the said question, and upon any other question that may be raised before him at the enquiry. The findings should be submitted within one month from this date, and the parties may file objections to the said findings within seven days after notice of the return of the same has been posted up in this Court."

In accordance with the above order the District Munsif submitted the following

FINDINGS:—"In obedience to the order of the High Court directing me to take evidence in the case and submit findings on the question whether the payment of kist by plaintiff was voluntary and upon any other questions that may be raised at the enquiry, I proceed to record my findings.

"At the original trial plaintiff was examined on his own side, and both sides dispensed with further evidence. Plaintiff has been recalled and examined again. Defendant has examined himself. No other witnesses have been examined on both sides. So, on the evidence of the parties alone the findings have to be recorded. Plaintiff in his evidence admits that the defendant was in possession of the land and there was a suit by him (plaintiff) against the defendant regarding the land, and during the pendency of that suit he paid the kist. He further admits that the defendant had paid the kist for the land in the year prior to that when plaintiff paid the kist. Defendant swears that for 20 years prior to the plaintiff's payment in question he had paid the kist for the land. It is also in the plaintiff's evidence that he presented a petition to the Tahsildar that the kist of the plaint land should be received from him, and not from one Muthu Reddi (who had bought a portion of the land from defendant) and that it was thereafter that he paid the kist to the Village Munsif. Having applied to the Tahsildar for an order directing the Village Munsif to receive the kist from him (plaintiff), I do not believe that the plaintiff

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would have told the Village Munsif to demand from defendant the payment of kist as he was in possession of the land. As suggested by the defendant in his evidence, plaintiff wanted, I believe, to pay the kist himself so as to support his possession or enjoyment of the land, when, as admitted by him now, he was not in possession. When, as sworn to by defendant, he had paid the kist for 20 years previously, there was no necessity or reason whatever for the plaintiff to pay the kist in fasli 1311 for the first time, much less to apply to the Tahsildar for an order directing the Village Munsif to receive the kist from him. Defendant swears that he tendered the kist moneys to the Village Munsif for the faslies in question, but that he refused to receive them as he had received an order from the Taluq Office that he should receive the kist from plaintiff and not from the defendant or from Muthu Reddi. The Village Munsif has not been called to deny the defendant's statement on the point. Defendant had married the plaintiff's daughter, but she died 4 years ago and since then admittedly there has been misunderstanding between the parties; and plaintiff filed the suit O.S. 1183 of 1901 on this Court's file against defendant for recovery of this very land but lost it, his claim to the land having been disallowed. It was only during the pendency of that suit (neither before nor after) that plaintiff paid the kist for the land, with a view probably to secure evidence of his possession and enjoyment of the land in dispute. Otherwise the payments in question are not explicable. As admitted by plaintiff there was no demand issued to him for payment of kist and no processes, coercive or otherwise, had been taken against him therefor. It is simply idle and frivolous on the part of the plaintiff to say that the Village Munsif demanded him to pay the kist saying that he would get an order of attachment against him from the Taluk Office, when, in fact, prior to the Village Munsif's alleged demand for payment, plaintiff had himself courted an order from the Tahsildar directing the Village Munsif to receive the kist from him. On the whole I have no hesitation in holding that the payment by plaintiff of the kist for the land was purely voluntary and find the point accordingly."

JUDGMENT.—The question in this case is whether the plaintiff is entitled to recover from the defendant Rs. 45 and odd, the amount paid by him on account of the revenue due in respect of certain

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BOJA SELLAPPA REDDY v. VRIDHACHALA REDDY.

land which stood registered in his name, but which belonged to the defendant and was in the latter's possession when the money was paid. At that time a suit which the plaintiff had brought against the defendant for the possession of the property was pending, though it was since dismissed.

The District Munsif has held that the plaintiff was not entitled to a decree, and I think correctly.

Before me section 69 of the Indian Contract Act was relied on on behalf of the plaintiff and both sides directed their arguments wholly to the question whether the plaintiff was, within the meaning of the section, "interested" in the payment of the money, and the point, whether the money was what the defendant was *bound* to pay, was not discussed. I think it unnecessary to deal with those arguments, as, in my opinion, the suit fails on the ground that the demand for the revenue was one which the defendant was not *bound* to meet, though it was to his interest to have done so. Where land is assessed for revenue the owner thereof cannot by virtue of his ownership alone be held as compellable to pay the revenue. The right of the Government to proceed for the recovery of revenue is regulated by the Revenue Recovery Act. The property of the land-holder, *i.e.*, the registered holder, as well as the land on which the arrear is due may be seized, and sold, and such holder may also be arrested and confined. But as against an owner of land who is not the registered holder, the same remedies are not available and neither his property other than the land in regard to which the arrear accrued nor his person can be proceeded against. No doubt if the land liable for the revenue is sold in due course of legal process the unregistered owner's right to the land would be lost. But that shows nothing more than that it would be to his interest to pay up the arrear of revenue. Consequently such arrears cannot be said to be what the owner is *bound* by law to pay within the meaning of section 69 of the Indian Contract Act. Though as pointed out in Pollock and Mulla's commentaries on the Act, page 239, the law as laid down in section 69 of the Act, is, in some respects, wider than the English law on the subject, yet there can be no doubt that the two agree so far as the element under consideration with reference to an action for money paid is concerned. *Bonner* v. *Tottenham and Edmonton Permanent Investment*

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Building Society(1), where the matter was fully considered may be referred to. There the lessees of certain premises having assigned the term, the assignee mortgaged the premises by way of a sub-demise, under which, on default, the underlessees (mortgagees) were empowered to enter into possession or receive the rents. In the event of their doing so they covenanted to pay the rent reserved by the original lease. The underlessees, having entered into possession, did not pay the rent which accrued due under the lease while they were in possession. The lessees, having been compelled to pay it, sued the underlessees to recover the amount so paid. It was held that the action was not maintainable. The following remarks of A. L. Smith, L.J., are in point. "The ratio decidendi of *Moule* v. *Garrett*(2) is this: If A is compelled to pay B damages which C is also compellable to pay B, then A, having been compelled to pay B, can maintain an action against C for money so paid, for the circumstances raise an implied request by C to A to make such payment in his ease. In other words A can call on C to indemnify him. To raise this implied request both A and C must, in my judgment, be compellable to pay B; otherwise, as it seems to me, the payment by A to B so far as regards C is a voluntary payment which raises no implication of a request by C to A to pay." (Page 167.) Vaughan Williams, L.J., thus distinguished the case of the sub-lessee from that of an assignee: "As to the common liability of the lessee and the underlessee, they clearly are not both liable to be sued by the lessor for rent. The lessee alone can be sued, and the underlessee is only liable to the lessor in the sense that the lessor has a remedy *in rem* by distress on goods on the property demised and by the power of re-entry for non-payment of rent or breach of covenant. It is in this sense only that the underlessee can be said to be liable to the lessor for rent . . . . Is this a common liability within the reason on which the condition is based? I think it is not . . . . The common law principle requires a common liability to be sued for that which the plaintiff had to pay, and an interest of the defendant in the payment in the sense that he gets the benefit of the payment, either entirely, as in the case of the assignee of a lease, or *pro tanto*, as in the case of a surety who has paid, and has his action for contribution against his co-surety." (Page 174.)

(1) (1899) 1 Q.B., 161. (2) L.R., 5 Ex., 132 and 7 Ex., 101.

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It is thus clear that the plaintiff's claim, as sought to be made out with reference to section 69 of the Indian Contract Act is unsustainable.

Nor, in the circumstances of the present case, is the plaintiff entitled to rely on section 35 of the Revenue Recovery Act. It is not shown that the payment was made by the plaintiff to obtain the release of the land from attachment, made, or threatened. Even if it were so, the plaintiff was not a tenant, mortgagor or incumbrancer as required by the section.

If it is not superfluous to say so, the plaintiff was not in a position to have availed himself of even the special remedy provided by section 501 of the Civil Procedure Code under which a suitor can apply to the Court to be put in possession of land paying revenue to Government, which is the subject of the suit, when the party in possession neglects to pay the revenue and the property is consequently ordered to be sold, and can get a decree directing the repayment of the amount paid by him towards the revenue or get it charged on the land. For the land in litigation between the plaintiff and the defendant was not ordered to be sold, and the defendant had not only always been ready and willing to pay but did also tender the revenue due before the plaintiff made the payment, and that tender was not accepted by the village officers solely because the plaintiff taking advantage of his name being on the register objected to the defendant being allowed to pay, and insisted on the money being received from himself.

In every view therefore the payment by the plaintiff was voluntary. I dismiss the petition with costs.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice.

SRI RAJA SIMHADRI APPA RAO (PLAINTIFF), PETITIONER,

1906.
July 13.

v.

CHELASANE BHADRAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Jurisdiction, award of costs by Court trying suit without—Such award not a nullity —Civil Procedure Code—Act XIV of 1882, s. 646B.

A Court of First Instance, having no jurisdiction, tried and decided a suit passing a decree in favour of the plaintiff with costs. On appeal the decree was reversed on the merits and the suit was dismissed with costs of both Courts. All the parties and both the Courts had proceeded on the assumption that the lower Court had jurisdiction:

Held, that the award of costs by the Appellate Court was not a nullity and such amount was recoverable. Section 646 of the Code of Civil Procedure is an enabling section and does not cut down the jurisdiction of the appellate tribunal.

SUIT to recover Rs. 52–2–10 being the costs payable under the decrees in Appeal Suit No. 520 of 1898 and Second Appeal No. 1113 of 1899 by the deceased Chinna Subbayya to the plaintiff. Defendants Nos. 1 to 3 were the sons of Chinna Subbayya, and the fourth defendant was the minor son of the second defendant.—

Chinna Subbayya instituted a suit (Original Suit No. 17 of 1897) on the file of the District Munsif of Gudivada against the plaintiff to recover Rs. 200 and odd alleged to have been wrongfully collected from him by the plaintiff. The suit was triable by the Subordinate Court of Masulipatam as a small cause suit, but the District Munsif of Gudivada tried it as an original suit, being of opinion that the suit was not a suit cognizable by a Small Cause Court. He passed a decree in favour of the plaintiff in that suit. The defendant (the present plaintiff) appealed to the District Court. The District Judge heard the appeal on the merits and reversing the decree of the Munsif dismissed the suit with costs incurred in both Courts. A second appeal (Second Appeal No. 1113 of 1899) was preferred by the deceased which was dismissed

* Civil Revision Petition No. 429 of 1905 presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of M.R.Ry. N. Lakshmana Rao, District Munsif of Tenali, in Small Cause Suit No. 245 of 1905

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SRI RAJA SIMHADRI APPA RAO v. CHELASANE BHADRAYYA.

with costs. No objection to the jurisdiction of the Munsif was taken in any of the Courts by the parties. Chinna Subbayya having died, the present plaintiff sought to execute his decree for costs in all the Courts against the defendants. Being referred to a regular suit he instituted this suit to recover the amount.

The defendants objected *inter alia* that, as the District Munsif of Gudivada had no jurisdiction to try Original Suit No. 17 of 1897, all proceedings in appeal and second appeal were void and the orders in Appeal Suit No. 520 of 1898 and Second Appeal No. 1113 of 1899 awarding costs to the plaintiff were mere nullities.

The District Munsif passed a decree for the costs of Second Appeal No. 1113 of 1899 alone and dismissed the rest of the plaintiff's claim.

Plaintiff preferred this Civil Revision Petition under section 25 of Act IX of 1887.

K. N. Ayya for petitioner.

Dr. *S. Swaminadhan* for respondents.

JUDGMENT.—In this case Dr. Swaminadhan has conceded—and quite properly conceded—that if the plaintiff would have had a good case against Chinna Subbayya, supposing he were still alive, he would, in the events which have happened, be entitled to succeed against the defendants to this suit.

The short point I have to decide is, whether, having regard to section 16 of the Provincial Small Cause Courts Act, 1887, the decree of the District Judge in Chinna Subbayya's suit of 1897 directing Chinna Subbayya to pay the costs of the present plaintiff is to be *regarded* as a nullity, or as effective for the purpose of enabling the plaintiff to recover the amount claimed in the present suit. The suit of 1897, which was brought as an ordinary suit, was, according to the law as laid down in the case of *Karuppanan Ambalam* v. *Ramasami Chetti*(1), a suit cognizable by a Small Cause Court. In the suit of 1897 all parties and both Courts proceeded on the assumption that the suit was *not* a suit cognizable by a Small Cause Court. It seems to me that if the District Judge had acted on the view of the law taken in *Karuppanan Ambalam* v. *Ramasami Chetti*(1), and had dismissed the suit and directed the plaintiff to pay the defendant's costs,

(1) I.L.R., 21 Mad., 289.

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he would have had jurisdiction to make the order. I do not think it can be said that he had no jurisdiction to make the order as to costs because he proceeded on the assumption that the Court of First Instance had jurisdiction and dealt with the case on the merits. Section 646B of the Code of Civil Procedure is an enabling section and does not cut down the jurisdiction of the appellate tribunal. In second appeal to this Court in the suit of 1897, this Court was asked to exercise its power under section 622 and to hold that the District Judge had no jurisdiction to make the order as to costs. This Court declined to make any such order. I doubt if I should have power to go behind this order if I were desirous of doing so, which I certainly am not. The case of *Parameshwaran Nambudri* v. *Vishnu Embrandri*(1) is an authority for the proposition that in circumstances similar to those in the present case if the decree of the District Judge had been in favour of the plaintiff in the suit of 1897, this Court in the exercise of its discretion would decline to interfere in revision. In the case referred to, this Court held that the decree of the District Judge must be treated as effective. In the present case I think the decree of the District Judge should be so treated. The same view was taken in the case of *Ram Lal* v. *Kabul Singh*(2).

I think the plaintiff is entitled to a decree for the amount claimed, and I amend the Munsif's decree by inserting the amount claimed in lieu of the sum given under the Munsif's decree with interest at 6 per cent. from the date of suit and costs throughout.

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(1) I.L.R., 27 Mad., 479.

(2) I.L.R., 25 All., 135.

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APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice.

1906. August 2, 3, 7.

MARI VALAYAN AND OTHERS (PRISONERS), APPELLANTS,

v.

EMPEROR (COMPLAINANT), RESPONDENT.*

Criminal Procedure Code, Act V of 1898, ss. 297, 537—Misdirection to jury—Judge bound to state all the elements of offence and deal with evidence, differentiating evidence against each of the accused—Failure to do so not a mere irregularity.

Under section 297 of the Code of Criminal Procedure, the Judge must explain to the jury all the essential elements of the offence with which the prisoner is charged. An omission to do so is not a mere irregularity within the meaning of section 537.

It is a failure to comply with an express provision of the law and will vitiate the conviction.

The Judge should also point out to the jury the evidence against each of the accused and the circumstances which distinguish the cases of some of the accused from that of the others.

Mangan Das v. *Emperor* (I.L.R., 29 Calc., 379), referred to and followed.

THE appellants were tried by the Sessions Judge of Coimbatore for offences under section 395 of the Indian Penal Code and sentenced to various terms of imprisonment. The trial was conducted with the aid of jurors and the material portions of the Judge's summing up to the jury were as follows :—

"The accused are charged with dacoity. Dacoity is committed when any number of persons not less than five conjointly commit robbery.

"With regard to the evidence against particular accused: first, second and fourth witnesses speak against first accused ; they are all members of the family and, as they say, they had good opportunities of observing him because he seized hold of the first witness and took away the fourth witness' necklace ; the first, second and twelfth witnesses speak with reference to the second accused ; first, second, sixth and twelfth witnesses with reference to the third accused ; first, second, eighth, tenth and eleventh witnesses with reference to the fourth accused ; first, second, ninth, tenth and

* Criminal Appeal No. 200 of 1906, presented against the sentence of D. P. Oldfield, Esq., Sessions Judge of Coimbatore Division, in Case No. 100 Calendar for 1905.

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twelfth witnesses with reference to the fifth accused; first, second, eighth, ninth, tenth and eleventh witnesses with reference to the sixth accused; fifth, sixth, seventh, eighth, tenth and eleventh witnesses with reference to the seventh accused; sixth, seventh, and eighth witnesses with reference to the eighth accused; second, fifth, sixth, seventh and eleventh witnesses with reference to the ninth accused."

The accused appealed to the High Court against the conviction and sentence. The first and second grounds of appeal were—

(i) That the Sessions Judge omitted to explain to the jury the different elements constituting the offence with which the appellants were charged.

(ii) That the learned Judge had not pointed out to the jury the particular act or part which each accused is said to have played in the alleged dacoity.

Mr. *A. S. Cowdell* for appellants.

J. L. Rosario for the Acting Public Prosecutor in support of the conviction.

JUDGMENT.—This is an appeal by nine persons who were convicted by a jury of dacoity, and the appeal is upon the ground that the jury were misdirected by the learned Judge.

The main grounds of misdirection upon which counsel for the appellants relied were (1) that the learned Judge failed to lay down the law by which the jury were to be guided as required by section 297 of the Code of Criminal Procedure, and (2) that the learned Judge misdirected the jury in that he failed to call their attention to the nature of the evidence in so far as it affected each of the nine accused individually.

As regards the first ground, in laying down the law all that the learned Judge said was: "The accused are charged with dacoity. Dacoity is committed when any number of persons, not less than five, conjointly commit robbery." Now this is a correct exposition of the law so far as it goes, but it is clearly defective in that the learned Judge did not explain to the jury what is necessary to constitute the offence of robbery as that offence is defined in section 390 of the Indian Penal Code. This seems to me to be a real, and not merely a technical, defect. It is not to be assumed that every juryman knows the legal distinction between theft and robbery and the defect arising from the omission by the Judge to explain to the jury the essential elements of the offence of robbery

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MARI VALAYAN v. EMPEROR.

is not cured by the fact that evidence was given in this case, which, if believed by the jury, would warrant their conviction of the accused on the charge of dacoity. It is conceivable that by reason of the defect in the summing up, the jury did not direct their minds to the question whether the evidence established that hurt, or wrongful restraint, or fear of instant hurt or instant wrongful restraint, had been caused or attempted to be caused by the accused or any of them. It is quite possible that the jury were left under the impression that if they were satisfied that the accused had jointly stolen property it would be their duty to convict the accused of the offence with which they had been charged. At any rate it seems to me it may fairly be said that if the direction of the Judge leaves room for doubt as to whether the jury had present to their minds an essential element of the offence with which the accused are charged, the jury were not properly directed. I entirely agree with the principle which was applied by the Calcutta High Court in a case where the Judge charged the jury as follows:—"The law bearing on the case has been placed before you more than once in the addresses delivered by the learned pleaders on either side. I need not go into detail as to the law therefor." The Conrt set aside the conviction (see *Mangan Das* v. *Emperor*(1)). In the Calcutta case the Judge who tried the case relied upon the expositions of the law which had been given by the pleaders on both sides. In the present case the Judge appears to have relied on the assumption that the jury knew what constituted the offence of robbery. I may also refer to the observations of the Calcutta High Court in *Taju Pramanik* v. *Queen Empress*(2), with which I entirely agree. "In our opinion it was not sufficient for the Judge merely to read to the jury the definition of dacoity, and to leave it to them to find out whether the evidence produced for the prosecution made out a case under section 395 against the accused. It was the duty of the Judge to call the attention of the jury to the different elements constituting the offence, and to deal with the evidence by which it was proposed to make the accused liable under the section. His failure to do so, in our judgment, amounts to misdirections."

The omission of a Judge to lay down the law by which the jury are to be guided as required by section 297, Code of Criminal

(1) I.L.R. 29 Calc., 379. (2) I.L.R., 25 Calc., 711.

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Procedure, is usually described as misdirection and, in a sense, of course it is misdirection. But it is something more than misdirection. It is a failure to comply with an express provision of the law, and I am of opinion that section 537 of the Code of Criminal Procedure is not applicable in such a case.

As to the second ground of alleged misdirection, in paragraph 10 of his judgment the Judge points out to the jury that certain witnesses spoke with reference to the several accused respectively. With regard to the first accused he mentions the nature of the evidence of the witnesses who speak against him and gives a good reason why these witnesses should be believed. As regards the other accused he merely refers to the witnesses and says nothing about their evidence—"the first, second and twelfth witnesses speak with reference to the second accused; the first, second, sixth and twelfth witnesses with reference to the third accused," and so on. Now this paragraph of the summing up is supplementary to the rest of the charge and if there could be found in the earlier part of the charge a statement of the evidence as it affected the several accused individually, apart from what may be called the general evidence in the case, it could not, of course, be suggested that the omission in paragraph 10 amounted to misdirection. But though I find in the earlier part of the summing up, references, to the evidence as it affected accused Nos. 1, 2, 3, 5 and 6 individually, I can find no reference to the particular evidence with regard to the other accused, or except inferentially in paragraph 4, to the fact that accused Nos. 7, 8 and 9 were not named to the monigar. I think the Judge should have pointed out explicitly to the jury that accused Nos. 7, 8 and 9 were not named in the first instance, and that, as regards them, the case stood on a somewhat different footing from the case against the other accused.

There were other suggested grounds of misdirection but I do not think it necessary to discuss them as it seems to me they were of a trivial nature.

If the only substantial ground of suggested misdirection were that in connection with paragraph 10, it might well be that it would not be necessary for this Court to interfere. But if I came to the conclusion—and I can come to no other conclusion—that the Judge did not lay down the law to the jury, it seems to me I have no alternative but to set aside the convictions. I, of course,

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do not overlook the provisions of section 537 of the Code of Criminal Procedure, but for the reasons which I have stated I am constrained to hold that the convictions are bad. I accordingly set aside the convictions and direct that the accused be retried.

APPELLATE CRIMINAL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

1906. August 1.

PARAMASIVA PILLAI (ACCUSED), PETITIONER,

v.

EMPEROR, RESPONDENT.*

Criminal Procedure Code, section 106—Sentence, enhancement on appeal—Maintaining a sentence in its entirety though acquitting on some of several charges is enhancement—Appellate Court cannot make an order for security when original conviction not by one of the Courts specified in section 106.

Where the Magistrate convicted the accused of two distinct offences and passed only a single sentence for both and the Appellate Court acquitting the accused of one of the offences maintained the sentence in its entirety:

Held, that this amounted to an enhancement of the sentence passed for the offence, the conviction for which alone was maintained.

An order for security under section 106 of the Code of Criminal Procedure cannot be made by the Appellate Court unless the conviction appealed against was by a Court of the description specified in the first paragraph of the section.

THE petitioner was convicted by the Second-class Magistrate of Máyavaram of offences under sections 147, 323 and 379 of the Indian Penal Code and sentenced to undergo two months' rigorous imprisonment and to pay a fine of Rs. 50.

On appeal, the Sub-divisional Magistrate of Kumbakónam altered the conviction to one under sections 147 and 323 of the Indian Penal Code without, however, reducing the sentence and directed the petitioner to execute bonds to keep the peace for six months under section 106 of the Code of Criminal Procedure.

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* Criminal Revision Case No. 86 of 1906, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of A. R. Banerji, Esq., First-class Sub-divisional Magistrate of Kumbakónam, in Criminal Appeal No. 4 of 1906, preferred against the judgment of M. A. Abdur Rahim Sahib, Stationary Second-class Magistrate of Máyavaram in Calendar Case No. 421 of 1905 (*vide* Criminal Revision Cases Nos. 87 to 90 of 1906).

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PARAMASIVA PILLAI v. EMPEROR.

Petitioner preferred this Criminal Revision Petition.

P. R. Sundara Ayyar and *K. S. Ramaswami Sastri* for petitioners.

J. L. Rosario for the Public Prosecutor in support of the conviction.

ORDER.—We are unable to agree with the contention of the petitioner's vakil that the facts found by the Appellate Magistrate do not warrant a conviction under section 147, Indian Penal Code.

The other questions raised are concluded by authority.

The Second-class Magistrate convicted the accused under sections 147 and 379, Indian Penal Code, but passed only a single sentence for both the offences. The Appellate Court acquitted the accused of the offence under section 379, but maintained the sentence in its entirety. It has been held by this Court in *Ramanjam Pillai* v. *Emperor*(1) (Weir, Vol. II, p. 487-A, fourth edition), that this amounts to an enhancement of the sentence passed for the offence, the conviction for which alone is maintained. The same view has been taken in Bombay (*Queen-Empress* v. *Hanma*(2)), and Calcutta (*Ramzan Kunjra* v. *Ramkhelawan Chowbe*(3)). In such cases some reduction of sentence by the Appellate Court must be made, unless the Court thinks that the sentence ought not to be reduced, in which case it should refer the matter to the High Court for enhancement of the sentence.

As regards the order for security it has been held in the cases in *Muthia Chetty* v. *Emperor*(4) and *Mahmudi Sheikh* v. *Aji Sheikh*(5) that the Appellate Court cannot make an order under section 106 of the Code of Criminal Procedure unless the conviction on which the order is based was by a Court of the description specified in the first paragraph of the section. In the present case the conviction, having been by a Second-class Magistrate, was not by such a Court, and the order to give security was therefore illegal. The accused have undergone five weeks' rigorous imprisonment. Having regard to the fact that the accused have been acquitted by the Appellate Court on the charge of theft we reduce the sentence of rigorous imprisonment to that already undergone by them. We also set aside the order for security. We do not interfere with the fine imposed on the first accused.

(1) Crl. R.C. No. 141 of 1905 (unreported). (2) I.L.R., 22 Bom., 760.
(3) I.L.R., 24 Calc., 316. (4) I.L.R., 29 Mad., 190.
(5) I.L.R., 21 Calc., 622.

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PRIVY COUNCIL.

P.C.*
1907.
Nov. 7.
December 18.

JONALAGADDA VENKAMMA AND OTHERS (DEFENDANTS Nos. 1 AND 2),

v.

JONALAGADDA SUBRAMANIAM AND OTHERS (PLAINTIFFS AND DEFENDANT No. 3).

[On appeal from the High Court of Judicature at Madras.]

Hindu Law—Adoption—Adoption with consent of sapindas—Assent given on the strength of representation by widow that she had her husband's authority to adopt—Such authority found on evidence not to have been proved—Omission to ask consent of one of two of husband's nearest kinsmen, effect of.

The first appellant was the widow of a deceased Brahman who was separate in estate from his kinsmen two of whom were the respondents who were brothers of the deceased, and also divided between themselves. The widow, representing that she had the oral authority of her husband to adopt a son, obtained the assent of the second respondent, the older of the two brothers, who executed a dee purporting to ratify the husband's authority, and this was signed also by some remoter kinsmen of the husband; and the widow thereupon purported to adopt the second appellant as a son to her husband. The first respondent was not asked for his consent, the widow, alleging, as her reason for omitting to ask him, that she knew from his attitude towards the proposed adoption that he would refuse. In a suit brought by the first respondent to have the adoption declared void both the lower Courts found that there was not sufficient evidence to prove that the widow had any authority from her husband:

Held, by the Judicial Committee (upholding the judgment of the High Court) that the adoption was not made with the independent approval of the natural advisers of the widow, the assent of the kinsmen who were asked having been given not in the exercise of an independent judgment on the expediency of the proposed adoption, but as a ratification of the husband's authority which did not exist; and the appellants could not now set up such ratification as an independent ground of defence.

Nor had the widow justified her omission to ask for the authority of the first respondent, one of the nearest kinsmen of her husband, and holding an important position in the family. To consult him was essential to her obtaining the mind of the kinsmen on the adoption, and her reason for not consulting him was one which she was not entitled to give. Her case therefore failed in the quality of the consents actually obtained, and the adoption was not valid.

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* *Present :* Lord DAVEY, Lord ROBERTSON, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

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APPEAL from a judgment and decree (February 18th, 1903) of the High Court at Madras which reversed a decree (April 25th, 1901) of the District Court of Kistna.

The suit out of which this appeal arose was brought by the first respondent against the appellants and the second respondent, for a declaration that the adoption of the second appellant by the first appellant was invalid.

The District Court dismissed the suit with costs. On appeal the High Court (Benson and Bhashyam Ayyangar, JJ.) made the declaration sought for in the plaint, on the ground that the adoption had not been duly authorized. The facts of the case and the judgment appealed from are given in the report of the case in the High Court (*Subrahmanyan* v. *Venkamma*(1)).

On this appeal which was heard *ex parte*,

Kenworthy Brown for the appellants contended the adoption had been duly authorized and was a valid adoption. A widow, though she has not her husband's authority to adopt, may make a valid adoption with the assent of her kinsmen. This was laid down in the Ramnad case—*The Collector of Madura* v. *Mutu Ramalinga Sathupathy*(2), and followed in *Sri Virada Pratapa Raghuvada Deo* v. *Sri Brozo Kishoro Patta Deo*(3). This law was in force in the district from which the present law came; see pages 432, 433 of 12 Moore's I.A. The text on which it was based was in the Dattaka Mimansa . . . . Reference was made to the report of the Ramnad case when decided in the High Court. *The Collector of Madura* v. *Muttu Vijaya Raghunada Setupati*(4). It was contended that the consent of the kinsmen obtained was sufficient; it was unnecessary to obtain the assent of all of them; and the High Court was in error in holding that the appellant was bound to obtain the assent of the first respondent, and in not giving due weight to the assent of the remoter kinsmen. Exhibit III, the written consent obtained by the appellant, should be regarded as an independent assent, irrespective of whether she had or had not obtained the authority of her husband to adopt; and not as one given because she alleged that she had her husband's authority as a ratification of that authority. Reference was

(1) I.L.R., 26 Mad., 627.

(2) 12 M.I.A., 397 at pp. 442–444.

(3) L.R., 3 I.A., 154 at pp. 192, 193; I.L.R., 1 Mad., 69 (82, 83).

(4) 2 M.H.C.R., 206 at p. 221.

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VENKAMMA v. SUBRAMANIAM.

made to *Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar*(1); and *Venkatalakshmamma* v. *Narasayya*(2). The second respondent was the natural protector of the widow, and in the absence of her husband, was the person to whom she ought to go for assent to the adoption: his assent was therefore, it was submitted, sufficient.

On the 18th December 1906 the judgment of their Lordships was delivered by

Lord ROBERTSON.—The question in this appeal is of the validity of the adoption of the second appellant by the first appellant. That a form of adoption was gone through may be assumed; but the first respondent has obtained the decree appealed against, which declares the nullity of that adoption, on the ground that the first appellant, who is the widow, had not the requisite consent of her deceased husband or of his kinsmen.

The suit was brought in the District Court of Kistna; and, in that Court was dismissed with costs. This decree was reversed with costs by the High Court of Madras on 18th February 1903.

The deceased Ramayya was a Brahman and was separate in estate from his kinsmen. He died without issue in 1881; and his widow, the first appellant, succeeded to his property. The respondents, who are cousins of the deceased, are the nearest reversionary heirs to the estate. They are divided brothers, the second respondent being the elder, and they are the nearest kinsmen of the deceased. The second respondent, before the alleged adoption, executed a deed purporting to authorise it, and certain remoter kinsmen also signed this deed. The first respondent was not asked for his consent and never gave it. The alleged adoption took place on 20th April 1900.

One of the most important facts in the case is that the first appellant, the widow, at the time of the adoption and in her defence to this action, asserted that her husband had before his death given her, orally, permission to take a boy in adoption. Both Courts have held that this has not been established in evidence. It is only as a second and corroborative authority, that the first appellant obtained the deed of consent which has been mentioned. This failure of the appellants to prove the husband's authority enters deeply into the question about the kinsmen's consent, for it cannot be disputed that the first

(1) L.R., 7 I.A., 173; I.L.R., 2 Mad., 270. (2) I.L.R., 8 Mad., 545 at p. 548.

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appellant, in obtaining such consents as she did, represented herself to have received her husband's authority. Accordingly the respondents rely not merely on the absence of the consent of one of the two nearest kinsmen, but on the consents actually obtained having been given, not in the exercise of an independent judgment on the expediency of the proposed adoption, but rather as the ratification of what must now be taken to be the non-existent authority of the deceased husband. This is the view taken in the judgment appealed against, and in their Lordships' opinion it is sound.

It is unnecessary to re-state the law as to the persons whose authority is required for adoption, for the appellants' case fails in the quality of the consents actually obtained. But, in their Lordships' judgment, the appellants have failed to justify the widow in omitting to ask for the authority of a person holding so important a position in the family as did the first respondent. She defends herself by saying that she knew he would refuse; but she is not entitled to say so, and to consult him was essential to her obtaining the mind of the kinsmen on this family question. In truth, however, her conduct in this particular goes to prove, along with the other facts, that the mind of the kinsmen was not what she was in search of. The consent which she asked and obtained was ratification of the authority already given by the husband, for this is expressly stated in the written consents on which the appellants found. It is impossible for the appellants now to set up this as an independent ground of defence. Even if the first respondent had been consulted and had consented on the same footing as the others, there is absent from this adoption the independent approval of the natural advisers of the widow. But the failure to consult one of the two nearest kinsmen has not been justified.

Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed. The respondents not having appeared, there will be no order as to costs.

Appeal dismissed.

Solicitor for the appellants: *Douglas Grant.*

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APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

1906. January 23, 29. February 15. July 16. August 6.

SADHU KRISHNA AYYAR (PLAINTIFF), APPELLANT,

v.

KUPPAN AYYANGAR AND OTHERS (DEFENDANTS NOS. 9 TO 11, 1 TO 5 AND 12 TO 16), RESPONDENTS.*

Civil Procedure Code Act XIV of 1882, *ss.* 108, 540, 562, 564, 588 (9)—*On appeal against* ex-parte *decree, Court may reverse decree on the ground that it was wrongly decided* ex parte *and remand the case.*

When a suit is decided *ex parte* an Appellate Court to which an appeal from the decree is preferred under section 540 of the Code of Civil Procedure, has jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the suit *ex parte*, and remand the suit for re-hearing.

Jonardan Dobey v. *Ramdhone Singh*, (I.L.R., 23 Calc., 738), not followed.

Parvatishankar Durgashankar v. *Bai Nival*, (I.L.R., 17 Bom., 733), dissented from.

Caussanel v. *Soures*, (I.L.R., 28 Mad., 260), dissented from.

Perumbara Nayar v. *Subrahmanian Pattar*, (I.L.R., 23 Mad., 445), followed.

SUIT for the recovery of immovable properties. The first defendant was declared *ex parte* and a decree was passed in favour of the plaintiff.

Some of the defendants appealed and the first defendant, who was the second respondent in the appeal presented a memorandum of objections to the decree on the ground that she was improperly declared *ex parte*.

The District Judge allowed this objection. The material portion of his judgment was as follows:—

The evidence of first defendant has not been rebutted. I therefore set aside the order of the District Munsif declaring first defendant to be *ex parte*. I further set aside the decree of the lower Court and remand the case for re-admission under its

* Civil Miscellaneous Appeal No. 113 of 1905, presented against the decree of H. Moberly, Esq., District Judge of Madura, in Appeal Suit No. 336 of 1904, presented against the decree of M.R.Ry. B. Krishna Row, District Munsif of Periyakulam, in Original Suit No. 399 of 1903.

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original number and for re-trial in the presence of first defendant or her pleader, costs of this appeal to be costs in suit. The first defendant has paid the necessary Court fee on her memorandum of objections.

Plaintiff appealed to the High Court. The chief ground of appeal was that the District Judge had no jurisdiction to set aside the *ex-parte* decree against the first defendant when no application had been made to set it aside before the District Munsif.

The case came in the first instance before Moore and Sankaran Nair, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH—MOORE, J.—The following is the view that I take of this case.

I am of opinion that, as the matter came before him, the District Judge had no jurisdiction to set aside the order of the District Munsif declaring that the suit should be heard *ex parte* in so far as the first defendant was concerned.

Notwithstanding, however, that the first defendant had taken no steps under section 108 of the Civil Procedure Code to get the decree passed against her, *ex parte,* set aside, I am of opinion that it was open to her under section 544 of the Civil Procedure Code to appeal against the decree. When this appeal (presented in the form of an objection memorandum filed in connection with the appeal preferred by defendants Nos. 9, 10 and 11) came before the District Judge, it was open to him, if he thought that there was any substantial cause for so doing, to allow evidence to be produced before him on the part of the first defendant and, of course, by the other parties to rebut the evidence put forward by her. I have, however, no hesitation in holding that the decree of the District Judge setting aside the decree of the District Munsif and sending back the suit to him for re-trial, was illegal, inasmuch as the District Judge has, in passing such a decree, exceeded the powers given to him by the Civil Procedure Code with respect to remanding cases on appeal (*vide* sections 562 and 564 of the Civil Procedure Code). I have, however, no objection to the reference to a Full Bench proposed to be made by my learned colleague.

SANKARAN NAIR, J.—This suit was filed against 16 defendants; it was withdrawn against defendants Nos. 6, 7, 8 and 12 and in respect of properties items Nos. 5 to 18, 22 and 24; it was dismissed against the sixteenth defendant and in respect of

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properties items Nos. 25 and 26. The first defendant and some others did not appear and the suit was heard *ex parte* so far as they were concerned, and the plaintiff eventually obtained a decree for the recovery of the other items of properties sued for, from the defendants who did not appear and others who contested the suit.

Some of the contesting defendants filed an appeal making the plaintiff and the first defendant respondents. Then the first defendant contested the validity of the decree on the ground that she had no notice of the suit in the lower Court and that the Court was accordingly wrong in proceeding *ex parte* with the trial.

The Judge has found that the first defendant was not aware of the institution of the suit and that the summons was not personally served on her. He has accordingly set aside the decree and remanded the suit for trial in the presence of the first defendant.

The first question is whether the Judge had jurisdiction on the facts found by him to do so.

Section 564, Civil Procedure Code, enacts that the Appellate Court shall not remand a case except as provided under section 562. An order of remand if it cannot be supported under that section is therefore illegal and must be set aside—see *Seshan Pattar* v. *Seshan Pattar*(1), *The Manager of the Court of Wards, Kalahasti Estate* v. *Ramasami Reddi*(2)—see also *Rameshur Singh* v. *Sheodin Singh*(3).

In *Perumbra Nayar* v. *Subrahmanian Pattar*(4) it was held that an order similar to the one now under appeal which does not purport to be under section 562 or "any other particular section of the Code" was within the powers of an Appellate Court, though in *The Manager of the Court of Wards, Kalahasti Estate* v. *Ramasami Reddi*(2), it is stated that such order is warranted by an earlier provision of the Code. It is true that to give effect to some specific provision in the Code, it has been decided that an Appellate Court has the power to set aside the decree and remit the case for re-trial—see *Habib Bakhsh* v. *Baldeo Prasad*(5), but I have been unable to find any such provision in the Code justifying a remand as in this case.

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(1) I.L.R., 23 Mad., 447.
(2) I.L.R., 28 Mad., 437, at p. 440.
(3) I.L.R., 12 All., 510.
(4) I.L.R., 23 Mad., 445.
(5) I.L.R., 23 All., 167 at p. 168.

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The only provisions that may have a bearing are sections 108 and 588, clause (9). They do not refer to or justify a remand. When an order passed under section 108 is set aside in appeal and the Judge is directed to try the case in the presence of the first defendant he does not set aside any decree passed by the Court of first instance.

There being no specific provision in the Code justifying the order of remand passed, I would set aside his order and direct him to restore the appeal to his file and decide it in accordance with law.

If the Judge comes to the conclusion that the first defendant was not aware of the suit, or that she ought to be allowed an opportunity of adducing her evidence, it will be open to him to follow the procedure prescribed by section 566 or 568, Civil Procedure Code, as may be applicable to the case.

I agree with the judgment of Sargent, C.J., in *Parvatishankar Durgashankar* v. *Bai Naval*(1). This opinion is in conflict with the view in *Perumbra Nayar* v. *Subrahmanian Pattar*(2). I am unable to agree in the view that an Appellate Court has power to set aside a decree and remand a suit for hearing even when not authorized to do so by any specific provision of law.

As the question is of some importance, I would refer for the decision of a Full Bench the question, viz.—

Whether, when a suit is decided *ex-parte*, an Appellate Court has jurisdiction, in an appeal against the decree so passed, to reverse the decree of the Court of First Instance on the ground that the First Court was wrong in proceeding to decide the suit *ex-parte*, and remand the suit for re-hearing, such order of remand not having been passed under section 562 or for any of the reasons mentioned therein.

The appeal came on for hearing in due course before the Full Bench constituted as above.

T. V. Seshagiri Ayyar and *K. Kuppuswami Ayyar* for appellant.

The Hon. Mr. *P. S. Sivaswami Ayyar* and *M. Narayanaswami Ayyar* for respondents.

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(1) I.L.R., 17 Bom., 733. (2) I.L.R., 23 Mad., 445.

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The Court expressed the following

OPINION (Sir ARNOLD WHITE, C.J.).—Under section 588 (9) of the Code there is an appeal against an order rejecting an application under section 108, whilst section 540 provides that an appeal may lie from an original decree passed *ex-parte*. The word *may* is used in the part of the section which gives a right of appeal from an *ex-parte* decree, whilst the word *shall* occurs in the earlier portion of the section. It is, no doubt, a reasonable view that the appeal given by section 540 in the case of *ex-parte* decrees is not an appeal in all cases as of right but an appeal when a party appeals on the merits of the case and not upon the ground that the summons was not duly served or that the defendant was prevented by sufficient cause from appearing when the suit was called on; in other words, that a party who desires to upset an *ex-parte* decree on the ground that the decree ought not to have been made *ex-parte*, must first apply under section 108, and if an order is made against him, that he has no right of appeal against the decree under the general enactment contained in section 540, but only a right of appeal against the order under the special enactment contained in section 588 (9).

This appears to have been the view taken by the Calcutta High Court in *Jonardan Dobey* v. *Ramdhone Singh*(1). Their Lordships observe "When a decree is passed *ex-parte* against a defendant, a remedy by appeal is now always open to him by section 540 of the Code of Civil Procedure as amended by Act VII of 1888. But such a remedy can be efficacious only in those cases, and their number must be small, in which the *ex-parte* decree is either wrong in law on the face of the proceeding or is based upon evidence so weak that even though unrebutted it is insufficient to sustain the decree. In the great majority of cases in which a defendant having a good defence has had an *ex-parte* decree passed against him, the disadvantage he labours under is that he has not been able to substantiate his defence by evidence before the Court. Upon the record, as it stands, the *ex-parte* decree may be wholly unassailable, but, if the defendant has an opportunity (which he was prevented from having owing to some sufficient cause) of placing on the record evidence which he could have adduced to substantiate his defence, no such decree should have been passed.

(1) I.L.R., 23 Calc., 738.

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The remedy in such a case cannot be by way of appeal which must ordinarily proceed upon the record as it stands. The proper remedy must be the one provided by section 108 of the Code of Civil Procedure."

If I could adopt this view I should have no difficulty in holding that in an appeal against an order under section 588 (9) the Appellate Court with a view to making its own order effective can send back the case to be disposed of on the merits (such an order, as it seems to me, is not an order of remand within the meaning of the words as used in sections 562 and 564); but that when the appeal is on the merits under section 540 an order of remand could not be made. However, the observations of the Calcutta High Court as regards this point are merely *obiter* and they seem to me to involve the reading into the Code of a great deal which the Legislature might have said but did not say. I think it must be taken that the Legislature by accident or design has given a right of appeal, apart from the merits, against an order on the ground that the defendant was not in default in failing to appear and against an *ex-parte* decree, also apart from the merits, upon the same grounds. There is a power to remand a case when the Appellate Court reverses an order refusing to set aside an *ex-parte* decree and it seems to me anomalous to hold that there is no such power when the Appellate Court allows an appeal against a decree upon the ground that there ought not to have been an *ex-parte* decree against the defendant. So far as convenience is concerned it is certainly much more convenient that a case should go back than that the Appellate Court should deal with the case under section 566 or section 568. I do not overlook the fact that to hold that, in such a case, an order of remand can be made is contrary to the view taken by Sir Charles Sargent in *Parvatishankar Durgashankar* v. *Bai Naval*(1) by the two learned Judges by whom the Order of Reference in the present case was made, and by myself and O'Farrell, J., in *Caussanel* v. *Soures*(2). On further consideration, however, and after hearing the point fully argued, I am of opinion that the better view is that taken by this Court in *Perumbara Nayar* v. *Subrahmanian Pattar*(3) and by the Allahabad High Court in *Habib Bakhsh* v. *Baldeo Prasad*(4).

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(1) I.L.R., 17 Bom., 733.
(2) I.L.R., 23 Mad., 260.
(3) I.L.R., 23 Mad., 445.
(4) I.L.R., 23 All., 167 at p. 168.

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I would answer the question which has been referred to us in the affirmative.

SUBRAHMANIA AYYAR, J.—I concur.

BENSON, J.— I concur.

The case came on for final hearing before Miller and Wallis, JJ., when the Court delivered the following

JUDGMENT.—This is an appeal from an order of the District Judge setting aside the judgment of the District Munsif and remanding the case for trial on the ground that the first defendant had not been served. This order was not passed under section 562, Civil Procedure Code, and consequently there is no appeal from it under section 588 (clause 28), but when the case first came before this Court on appeal, and objection was taken to the jurisdiction of the lower Appellate Court to pass the order, it was treated apparently as revision petition under section 622 and the case was referred to a Full Bench which has decided that the lower Appellate Court had jurisdiction to make the order of remand. It is now argued that admitting that there was jurisdiction to set aside the judgment against the first defendant, there was no jurisdiction to set it aside against the other defendants, who appeared and contested the suit, a point which was not before the Full Bench. We think, however, that the plaintiff has not shown any excess of jurisdiction or material irregularity in this respect so as to justify us in interfering under section 622.

The appeal is dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

1906.
August 2, 3

NEELAKANDHAN NAMBUDRIPAD STYLED MURTHI KANDHAN AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

TIRUNILAI ANANTHAKRISHNA AYYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Court Fees Act VII of 1870, *s.* 17—'*Two or more distinct subjects*'—*First part of section applies to cases where alternative reliefs on different causes of action are joined in one suit*—*Malabar Law*—*Ubhayapattom*—*Agreement in mortgage perpetually void as a clog on the equity of redemption.*

The operation of section 17 of the Court Fees Act is not necessarily confined to cases where cumulative reliefs are claimed.

Alternative claims, forming different matters which could have been made the grounds of separate suits are 'distinct subjects' within the meaning of the section, although they arise out of the same instrument and a suit for enforcing such alternative claims ought to be valued for the purpose of Court-fees as also of jurisdiction on the aggregate value of such reliefs.

Kashinath Narayan v. *Govinda Bin Piraji*, (I.L.R., 15 Bom., 82), not followed.

An 'Ubhayapattom' is a kanom mortgage.

Where from the terms of an Ubhayapattom it is clear that the debt was not intended to be extinguished, a covenant for perpetual renewal by the mortgagor operates as a clog on the equity of redemption and the addition of the words 'you shall hold the properties for ever without surrendering them' does not convert such a transaction into an immediate grant of a permanent interest.

Such a covenant will be inoperative as a clog on the mortgagor's right of redemption in a mortgage executed before the passing of the Transfer of Property Act and subsequent to 1858, on the principles of equity which formed the basis of judicial decisions during that period.

PLAINTIFFS sued to redeem 22 items of immoveable property mortgaged by first plaintiff's predecessor Murthi Kandhan Nambudripad to first defendant for Rs. 3,000, under an Ubhayapattom deed, dated 3rd Thulam 1048 (17th October 1872). Defendants Nos. 2 to 12 were the heirs of first defendant and defendants Nos. 13 to 30 were tenants in possession of the property. Plaintiffs prayed *inter alia* (1) To redeem the plaint

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* Appeal No. 162 of 1903, presented against the decree of P. J. Itteyerah, Esq., Subordinate Judge of South-Malabar at Palghat, in Original Suit No. 31 of 1902.

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NEELA-KANDHAN v. ANANTHA-KRISHNA AYYAR.

lands after setting off arrears of purapad Rs. 2,847-3-8 against the kanom, Rs. 3,000 and the value of improvements due to defendants.

(2) That if the Court found that plaintiffs were not entitled to redeem, then to recover from defendants Nos. 1 to 12 the renewal and Opputhooshi fees for the years 1060 (1884-85) and 1072 (1896-97) with interest on both (Rs. 2,419-5-4).

The material conditions of the deed (exhibit III) on which the plaintiffs claimed were as follows:—

"Ubhayapattom deed executed on 3rd Thulam 1048 (17th October 1872) . . . . received from you Ramasami Patter's son Anantaraman 29 years cultivator . . . . Rs. 3,000 . . . . In consideration for the said Rs. 3,000 received you may hold on Ubhayapattom right 43 plots of land at Katavakote . . . . You shall from the year 1048 annually deliver dried and winnowed, in the month of Makaram by my rent para, 25 paras of paddy worth Rs. 7-2-4 being micharam due per annum . . . . If you allow the micharam to fall, in arrears, you shall pay the same with interest at 2 per 10. You may hold the properties for ever without surrendering, them, after taking a renewed demise on the expiry of (every) 12 years on payment of the money accruing at the rate of 1¼ per 10 and due to me on account of renewal fee, of the value of stamp paper, and of the signing fee . . . ."

The defendants contended *inter alia* that under exhibit III, the family of defendants Nos. 1 to 12 acquired a perpetual mortgage right.

This contention was decided against the plaintiffs, by the lower Court under issues Nos. 7, 9 and 10, as follows:—

It is contended that on the true construction of this document (exhibit III) perpetuity of tenure was contingent on regular payment of purapad and renewal fee, and that as first defendant made default in making such payments he is liable to be redeemed. I do not agree in this contention. If such had been the intention, it could very easily have been so expressed. The following is the material portion of the document—"you must pay micharam of Rs. 7-2-4, &c., in makaram every year and obtain receipts. If you let the micharam fall into arrears you must pay it with interest at 2 per 10. After 12 years you must pay renewal fee at 1¼ per 10, stamp value and Opputhooshi, obtain renewal and enjoy the

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properties for ever without surrendering them." The document is designated in the opening passage as an *Ubhaya pattola adharam* or usufructuary mortgage-deed and there is a recital that the improvements in a portion of the property have not been valued or paid for. These facts are pointed out by plaintiff as indicating that the perpetual grant was not absolute but was contingent on the payment of renewal fee.

No doubt the document is a mortgage deed but the express recital that it is to enure for ever cannot be ignored or got over. If it was intended that the properties were never to be redeemed there was of course no necessity for saying anything about the improvements, nor for that matter, need the mortgage amount have been mentioned either But the contingency does not necessarily depend on the punctual payment of renewal fee.. If the arrears of micharam accumulated to such an extent as to absorb the whole of kanom I suppose that plaintiff would be entitled to redeem, and in that case it would become necessary to adjust the value of improvements.

I find these issues against plaintiff.

The Subordinate Judge passed a decree for renewal fee and purapad and dismissed the rest of the plaintiffs' claim.

Plaintiffs preferred this appeal.

The Hon. The Advocate-General *P. R. Sundara Ayyar* and *C. V. Anantakrishna Ayyar* for appellants.

T. R. Ramachandra Ayyar and *M. R. Sankara Ayyar* for first respondent.

Mr. *C. Madhavan Nair* and *C. Krishna Nair* for thirteenth to seventeenth respondents.

JUDGMENT.—A preliminary objection has been taken that the appeal lies to the District Court and not to this Court. We are unable to admit this objection. The claim in the present case is in the alternative, first, for redemption of a mortgage, the principal amount secured whereby is Rs. 3,000, and in the event of that failing, then, secondly, to recover from the defendants various sums aggregating more than Rs. 2,000, on the footing of a mortgage to be executed by the plaintiff to the defendants in accordance with certain provisions contained in the earlier mortgage. The decisions in *Motigavri* v. *Pranjivan Das*(1)

(1) I.L.R., 6 Bom., 302.

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and *Kashinath Narayan* v. *Govinda Bin Piraji*(1) hold that section 17 of the Court Fees Act applies only to cases where cumulative reliefs are claimed. A contrary view appears to have been taken by the Punjab Chief Court, though the actual language employed by the Court is not before us (see page 104, Jaganatha Iyer's 'Court Fees Act').

Section 17 of the Court Fees Act, says merely that "where a suit embraces two or more distinct subjects the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act." We see nothing in this language to warrant the operation of the section being confined to cases in which the reliefs are cumulative.

No doubt the second paragraph of the section referring to paragraph 2 of section 45, Civil Procedure Code, refers to cases where *primâ facie* the relief sought is cumulative, but the general words of the first paragraph of the section cannot be limited to the class of cases dealt with by the second paragraph which was introduced *ex majore cautela* in order to prevent the first paragraph being construed as intended to restrict the power of the Courts in regard to joinder of causes of action.

The phrase "two or more distinct subjects" in section 17 may not admit of precise definition applicable to all cases, and it may be that where reliefs are claimed in the alternative with reference to the same cause of action, section 17, would not govern the case. That may also be so where the relief claimed is one and the same, though the claim is sought to be made out on distinct or alternative grounds. It is, however, different in the present case. The claim for redemption is based upon the alleged right of the plaintiff as mortgagor, while the alternative relief is based on a contract for a further mortgage which is distinct from the earlier mortgage right, though both are evidenced by the same instrument. The alternative claims therefore are distinct matters which could have been made the grounds of separate suits, and it would therefore seem to be reasonable to hold that they are "distinct subjects" within the meaning of section 17. It follows therefore that the value of the suit for purposes of Court-fees is more than Rs. 5,000 and consequently also for purposes of jurisdiction.

(1) I.L.R., 15 Bom., 83.

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Passing to the merits, the questions for determination are whether, upon the true construction of exhibit III and its counterpart, exhibit A, of the 17th October 1872, the first respondent is entitled to hold in perpetuity, without reference to any further assurance to be executed by the mortgagor or his representatives, and whether the provisions in the concluding part of the instruments are invalid, and not binding on the plaintiff, by reason of their being a clog on the mortgagor's right of redemption.

The instruments are in the Malayalam language, and the Subordinate Judge, who is a native of the district and presumably well acquainted with that language has arrived at the conclusion that the instruments create a right in favour of the mortgagee entitling him to hold for ever independently of the execution of any assurance by the mortgagor or his representatives. Though we should hesitate to differ from the Subordinate Judge as to the meaning of the mere language of the documents we cannot say that the view adopted by him as to the legal effect of that language is correct. As pointed out on behalf of the plaintiff, the transaction is described in the documents as an *Ubhayapattom* which is equivalent to the more common expression "a kanom mortgage." If the grantor meant to create a present permanent right in the grantee he would have found no difficulty in describing the transaction by a more suitable name. It is unlikely that in such a case the periodical payment provided for would be spoken of as a renewal fee, nor would the time when such payment was to take place have been fixed at the conclusion of every twelve years as in the case of an ordinary kanom, and still less is it likely that he would have stipulated for the grantee taking a fresh document at each renewal.

That the Rs. 3,000 was a debt is undoubted. It was a debt prior to the execution of the instruments, and nothing in the instruments can be said to operate to extinguish the debt The reasonable view therefore seems to us to be that both in essence and in form the instrument was nothing more than security for a debt with certain additional stipulations not usual in such securities. The respondents' vakil contends that the words "you shall hold (the properties) for ever without surrendering them" renders the transaction an immediate grant of a permanent interest, but this contention virtually ignores the effect of the important clause which proceeds these words, and which provides for the

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payment of the renewal fee and the obtaining of a fresh deed. The instruments seem to us to constitute a mortgage transaction with a covenant by the mortgagor to renew every twelve years on the terms provided for. In this view the second question also must be answered in the affirmative for the obvious reason that a covenant to renew perpetually is a clog on the mortgagor's right to redeem, and, having been entered into simultaneously with the mortgage, is inoperative.

On behalf of the respondent, section 98 of the Transfer of Property Act was relied on; but the transaction having taken place prior to the Transfer of Property Act the question has to be determined with reference to the law in force prior to that Act, and it is unnecessary to express any opinion as to the effect of section 98 on covenants such as those now in question in anomalous mortgages executed after the passing of the Act.

According to the rules of equity which formed the basis of the course of decisions prior to the Act, but subsequent to 1858, any agreement entered into at the time of the mortgage having the effect of clogging the right of redemption was inoperative. It follows, therefore, that the plaintiff is entitled to redeem, no renewal subsequent to exhibit III having been granted by him. We therefore set aside the decree of the Subordinate Judge and give the plaintiff a decree for redemption on payment of the mortgage amount of Rs. 3,000 *plus* Rs. 2,250-14-8 for improvements *minus* Rs. 115-6-0 (the interest claimed by the plaintiff being disallowed) payable by the mortgagee to the mortgagor on account of michavaram up to the date of the plaint, with the costs of the first defendant throughout. The first defendant shall account to the plaintiff for michavaram subsequent to the date of the plaint until delivery. The amount shall be paid into Court by the plaintiff within six months from this date and shall be applied in the first instance to the discharge of the mortgage money due by the first defendant to defendants Nos. 13 to 17, viz., Rs. 5,000 and their costs. The first defendant shall bear the costs of defendants Nos. 13 to 17.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

RENGA SRINIVASA CHARI (THIRTIETH DEFENDANT), APPELLANT,

1906. August 21, 22, 28.

v.

GNANAPRAKASA MUDALIAR AND OTHERS (PLAINTIFFS, AND DEFENDANTS NOS. 1 TO 5, 7, 8, 10 TO 19, 22 TO 29, 31 TO 39 AND 41 TO 46, FIFTH DEFENDANT'S LEGAL REPRESENTATIVES AND THIRTEENTH DEFENDANT'S LEGAL REPRESENTATIVES), RESPONDENTS.*

Appeal, abatement of—No abatement by death of respondent when appeal could proceed in the absence of his representative—Mortgage, lien of party paying prior, extinguished when part of mortgaged property is purchased for such amount—Sale for revenue—Trusts Act II of 1882, *s.* 90—*Transfer of Property Act IV of* 1882, *s.* 65—*Purchaser of equity of redemption from mortgagor not bound to pay public charges and is not when he purchases the lands at a revenue sale a constructive trustee under s.* 90 *of the Trusts Act.*

An appeal does not abate by reason of the failure of an appellant to bring on record the representative of a deceased respondent within the time prescribed therefor, if the appeal can proceed in the absence of such representative to a final and complete adjudication.

Where a person paying off a prior mortgage, purchases a portion of the mortgaged properties in consideration of the amount so paid by him, the lien acquired by such payment is extinguished and cannot be used by such purchaser as a shield against a subsequent mortgagee. The assignee of a mortgage decree purchasing a portion of the mortgaged properties, acquires over such portion a lien for only a proportionate share of the mortgage amount.

The implied covenant on the part of the mortgagor, under section 65 of the Transfer of Property Act, to pay the public charges on the properties mortgaged does not extend to the purchaser of the equity of redemption from the mortgagor. Such purchaser in omitting to pay such charges does not fail to discharge any obligation owing from him to a mortgagee of the said properties, and in purchasing such properties at a revenue sale for non-payment of such charges, he does not gain an advantage as qualified owner in derogation of the rights of the mortgagee or other persons interested in the property so as to constitute him a constructive trustee for them under section 90 of the Trusts Act.

SUIT to recover the amount due on a mortgage bond executed by the first defendant in favour of one D, who transferred the bond

* Appeal No. 33 of 1902, presented against the decree of M.R.Ry. K. Ramachandra Ayyar, Subordinate Judge of Negapatam, in Original Suit No. 66 of 1896.

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to the plaintiff. The second defendant was the minor son of the first defendant.

The facts necessary for this report are set out in the judgment.

P. R. Sundara Ayyar and *K. Srinivasa Ayyangar* for appellant.

V. Krishnaswami Ayyar for first respondent.

JUDGMENT.—The forty-first defendant has died pending the appeal and more than six months ago. No application has been made to bring on her representative as a party to the appeal. Mr. Krishnaswami Ayyar takes the objection that in these circumstances this appeal which is by the thirtieth defendant must abate.

The facts, so far as this question is concerned, are these: The plaintiff sues to enforce a mortgage executed by the first defendant. The second defendant is the son of the first defendant and all the other defendants are made parties as setting up encumbrances or some other claim to the property. The forty-first defendant did not present a written statement and her vakil informed the Subordinate Judge that he would adopt the defence of the thirtieth defendant, the present appellant. The only way in which this assertion can be understood is by considering it as referring to certain defences raised generally as to the plaintiff's right to maintain the suit, one of which was that the mortgage was executed without consideration. There is nothing to show that the forty-first defendant set up any particular right to any specific portion of the mortgaged property and it is not asserted that she possessed any interest in the property in which the thirtieth defendant, the appellant, claims a right.

In these circumstances we do not think the decision of the Judicial Committee in *Raj Chunder Sen* v. *Gangadas Seal* (1) relied on by Mr. Krishnaswami Ayyar has any application. The litigation there was between the members of a partnership, and bearing in mind this circumstance as well as the observation of the Committee "nor could it be contended successfully that the appeals could proceed in the absence of a representative of Abhoy Churn Chowdhry," we are of opinion that the ruling in that case was intended to be confined to cases in which the litigation cannot proceed without the representative of the deceased party, to a final

(1) L.R., 31 I.A., 71.

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and complete adjudication. That is not the case here and we overrule the objection.

The first point argued on behalf of the appellant was that the plaintiff was bound to pay to him (the appellant) Rs. 2,337–6–7 before he can proceed to enforce his mortgage against items Nos. 132 and 133 of the plaint schedule. This sum of Rs. 2,337–6–7 was, it is admitted, paid by the thirtieth defendant in discharge of a mortgage decree obtained against the plaintiff's mortgagor which had priority over the plaintiff's mortgage. The property affected by that mortgage consisted of 4 velis, of which items Nos. 132 and 133 formed only a portion, in extent about 15 mahs, 6 gulies or about one-sixth of the whole extent. Subsequent to the payment by the thirtieth defendant in discharge of the mortgage decree the sale, exhibit IV, under which he claims was executed, and under the terms thereof the items Nos. 132 and 133 were conveyed to the appellant, the remainder were taken by the vendor, the plaintiff's mortgagor. As between the appellant and his vendor it is impossible to hold that the appellant retained any lien over the five-sixth of the property which was subject to the mortgage-decree. From the very nature of the transaction the vendor took that land free from any claim on his part, more especially as it was agreed between them that the sum of Rs. 2,337–6–7, went in discharge of the price payable to the vendor. In these circumstances it must necessarily follow that the lien was extinguished. To hold otherwise would enable the thirtieth defendant to receive payment twice over.

We therefore disallow the claim under consideration.

The second objection relates to plaint items Nos. 134, 141, 146 and 147. These, with other lands, were hypothecated for Rs. 2,000 under a deed, dated the 14th April 1886, granted by the father of the plaintiff's mortgagor and his co-parceners. Under exhibit IV the thirtieth defendant was directed to pay Rs. 1,000 towards the mortgage amount. He did not pay, and a suit was brought by the holder of the hypothecation and both the present plaintiff and the thirtieth defendant were defendants in that suit. A decree was passed for sale and that decree not having been satisfied by any of the defendants, a sale was held under it, and the items in question were purchased by the appellant. That sale is binding upon the plaintiff who must consequently be held disentitled to enforce his mortgage as against these items.

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In Original Suit No. 22 of 1896 a decree was obtained on a hypothecation bond on the 5th September 1896. To this decree neither the plaintiff nor the appellant was a party. The appellant obtained an assignment of the decree, and got the hypothecated property sold, and realized all that was due to him from the sale-proceeds as well as by the purchase of items Nos. 142 to 145 measuring about 11 mahs out of a total mortgaged extent of 2 velis 1 mah and 8⅝ gulies and a house. The other property was purchased by third parties not before the Court. The appellant is entitled to a charge only for so much as would be payable out of the total mortgaged property in respect of the 11 mahs, namely, one-fourth of the amount of the decree. Subject to the payment of this amount the plaintiff will be entitled to proceed against these items also.

The last point relates to items Nos. 150 and 151. These items were sold for arrears of revenue payable in respect of the patta in which they were included with other land of the mortgagor and his co-parceners. Admittedly these items were put into the possession of the appellant under exhibit IV, but there was no mutation of names in the Collector's register. It is found, and there is no objection taken to the finding that the appellant paid the revenue due by him in respect of these lands, and that the default which led to the revenue sale was that of one of the co-parceners who was unconnected with the sale to the appellant or the mortgage to the plaintiff. As the Revenue authorities had a right to proceed against any portion of the property comprised in the holding without reference to the question of payment by the pattadars *inter se* the sale was valid and legal and the question is whether the appellant, who purchased these items in that sale, is entitled to hold them free of the plaintiff's mortgage. Mr. Krishnaswami Ayyar contended that, under section 90 of the Indian Trusts Acts, the appellant must be taken to have purchased the property for the benefit of all the persons interested, including the plaintiff whose mortgage comprised this land, subject to reimbursement of the amount to which the provisions of that section would entitle him. We are unable to agree with this contention. The fact that the appellant claims as vendee under the plaintiff's mortgagor does not subject him to the obligations to which the mortgagor would be subject as between himself and the mortgagee. No doubt under section 65 of the Transfer of Property Act to which

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SRINIVASA CHARI v. GNANAPRAKASA MUDALIAR.

Mr. Krishnaswami Ayyar referred, the mortgagor is to be taken to covenant in the absence of a contract to the contrary, to pay all public charges in respect of the mortgaged property when the mortgagee is not in possession. Not only the mortgagee but any one claiming through him is entitled to the benefit of this covenant, but the purchaser of the equity of redemption from a mortgagor is not a party to the covenant, and there is no obligation on him to pay the public charges accruing due in respect of what he has purchased, though it may be to his interest to do so to avert a sale. In omitting therefore to pay the arrears which were properly due by the co-parcener who was one of the registered pattadars the appellant cannot be said to have failed to discharge any obligation to which he was subject with reference to the plaintiff. In this matter he was in the same position as the plaintiff himself inasmuch as it was competent to the plaintiff to pay the arrears if he chose and prevent a sale—section 35 of Act II of 1864 (Madras). In our opinion the appellant in purchasing the property at the Revenue sale cannot be said to have availed himself of his position as a qualified owner of land to gain an advantage in derogation of the rights of other persons interested in the property. The plaintiff and the appellant were at arms' length and at the Revenue sale the appellant acquired a right to the property which put an end to the plaintiff's right under the mortgage.

The decree of the lower Court will therefore be modified by exonerating items Nos. 134, 141, 146 and 147, 150 and 151 from liability to the plaintiff's mortgage, and declaring that the items Nos. 142 to 145 are subject to a lien in favour of the appellant to the amount of Rs. 837–9–9, and directing that out of the proceeds of the sale of any of these items the appellant's lien be first discharged and the remainder, if any, applied towards payment to the plaintiff or other person entitled. The appellant will pay three-fourths of the costs of the plaintiff in the appeal, and will pay his own.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

1906.
August 17.

JATHAVEDAN NAMBUDIRI (THIRD DEFENDANT AND HIS REPRESENTATIVES), APPELLANT,

v.

KUNCHU ACHAN AND OTHERS (PLAINTIFFS NOS. 1 AND 2 AND DEFENDANTS NOS. 1 AND 2 AND SECOND PLAINTIFF'S REPRESENTATIVES), RESPONDENTS.*

Civil Procedure Code—Act, XIV of 1882, *ss.* 244, 331—*Defendants not joining in compromise on which decree is passed not judgment-debtors—Section* 331 *applies to such defendants.*

Where a decree passed on a compromise entered into between the plaintiff and some of several defendants in a suit does not adjudicate on the rights of the defendants who have not joined in the compromise, such defendants are not judgment-debtors and any disputes arising in execution of the decree between the plaintiff and such defendants must be decided under section 331 and not under section 244 of the Code of Civil Procedure.

Vibhudapriya Thirthasami v. *Vidianidhi Thirthasami,* (I.L.R., 22 Mad., 131), doubted.

SUIT registered as an original suit under section 331 of the Code of Civil Procedure, in the course of execution of the decree in Original Suit No. 57 of 1899.

The first plaintiff demised on kanom property to certain parties, who sold the kanom rights to K. K died leaving six undivided sons. Original Suit No. 57 of 1899 was instituted by the first plaintiff for redemption, and all the six sons of K and the second defendant and others were impleaded as defendants. A compromise was entered into between the first plaintiff and two of the sons of K (first and second defendants in Original Suit No. 57 of 1899) by which it was agreed that they should pay to the first plaintiff a certain amount, and, in default of such payment within the specified period, the first plaintiff should recover the properties on payment of Rs. 200 and a decree was passed in these terms. Default having been made by the first and second

* Second Appeal No. 887 of 1903 presented against the decree of N. S. Brodie, Esq., District Judge of South Malabar, in Appeal Suit No. 845 of 1902, presented against the decree of P. J. Ittoyerah, District Munsif of Palghat, in Original Suit No. 407 of 1901.

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defendants in Original Suit No. 57 of 1899, the first plaintiff paid the Rs. 200 and sought to recover possession in execution. The third defendant (who was no party to Original Suit No. 57 of 1899 but who had purchased the rights of the sons of K) and the other defendants obstructed the delivery of possession to the first plaintiff. Thereupon under section 331, the Court proceeded to try the matter as a regular suit. It was objected, *inter alia*, that, as the defendants were not parties to the decree, the matter should not be determined in execution, but that the plaintiff must bring a fresh suit for redemption. The District Munsif overruled the contention and passed a decree for redemption on the plaintiffs paying the cost of improvements. This was affirmed on appeal.

The third defendant appealed to the High Court.

T. R. Ramachandra Ayyar for second appellant.

P. R. Sundara Ayyar for *V. Krishnaswami Ayyar* for fifth to seventh respondents.

JUDGMENT.—The appellant's case has little or no merit. He claims by virtue of an assignment obtained from several of the sons of Krishna Pattar, a mortgagee of the plaintiff. All these persons were parties to a suit by the plaintiff for redemption of the mortgage, and, after issue of notice but before settlement of issues, the suit was compromised between the plaintiff on the one hand and the first and second defendants, two of the brothers, on the other. By the compromise it was arranged that a renewal should be granted within a given time, and in the event of the defendants failing to do all that was necessary to obtain the renewal, the plaintiff was to obtain possession of the land on payment of the mortgage money. A decree was passed in terms of this compromise. In the compromise it was stated that it was entered into without reference to the other defendants, and, though their names were entered in the heading of the decree, there was no order as regards them which could be taken as adjudicating upon any matter as between them and the plaintiff. The first and second defendants not having done what was necessary to entitle them to obtain the renewal, the plaintiff paid into Court the amount due by him and got an order for delivery of the land. A tenant who was in occupation of the land and who was one of the defendants who had not joined in the compromise, obstructed the delivery and, on the plaintiffs making application to the Court to remove the obstruction, his application was registered as a suit under

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JATHAVEDAN NAMBUDIRI v. KUNCHU ACHAN.

section 331, Civil Procedure Code. Subsequently the present appellant was added as a party defendant and the rights of all parties have been tried and a decree for redemption passed in favour of the plaintiff.

Mr. T. R. Ramachandra Ayyar for the appellant contended that the procedure adopted was wrong and the matter was one which should have been investigated and disposed of under section 244, Civil Procedure Code, only, and, as that section prohibits a separate suit, what has been done must be quashed and the plaintiff must be referred to his proper remedy.

We are unable to accede to this argument. As pointed out by Mr. P. R. Sundara Ayyar, section 331 directs that, when any obstruction is caused by a person other than the judgment-debtor. the decree holder's application shall be registered as a suit. The obstructing tenant was not a judgment-debtor, as defined in the Code. No decree having been passed against him, the application of the plaintiff was in our opinion rightly registered as a suit. In *Vibhudapriya Thirthasami* v. *Vidianidhi Thirthasami*(1) the attention of the Court does not seem to have been drawn to the provisions of this section and the Full Bench case of *Ramaswami Sastrulu* v. *Kameswaramma*(2) was not a case of obstruction like the present.

Mr. Ramachandraiyar urged that even in this view it was not competent to the Court to make a decree for redemption. We are unable to follow this contention. The decree obtained by the plaintiff, in the course of the execution of which he was obstructed, was a decree for redemption, and, as the parties resisting the execution established no claim independent of the mortgage right relied on by the plaintiff, the decree given is virtually an order for the execution of the decree the carrying out of which had been obstructed. In the view we have taken it is unnecessary to consider the other questions raised in the argument on either side. We dismiss the second appeal with costs.

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(1) I.L.R., 22 Mad., 131. (2) I.L.R., 23 Mad., 136.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

1906.
March 30.
August 22.

RAMA IYEN (SECOND DEFENDANT), APPELLANT,

v.

VENKATACHELLAM PATTER AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1 AND 3 AND PLAINTIFF'S LEGAL REPRESENTATIVES AND PARTY RESPONDENT), RESPONDENTS.*

Transfer of Property Act—IV of 1882, s. 130—Direction to pay, endorsed on instrument, amounts to assignment.

A direction in writing to pay the amount due on an instrument endorsed on such instrument, by the payee thereof, coupled with the delivery of the instrument so endorsed to the person to whom payment is directed is an assignment of such document within the meaning of section 130 of the Transfer of Property Act.

Brandts, Sons & Co. v. Dunlop Rubber Company, Limited, (L.R., 1904, 1 K.B., 387), distinguished.

SUIT by the plaintiff to recover the amount due on a promissory note executed in favour of one S by the second defendant and endorsed in favour of the plaintiff by S. The document Exhibit A, and endorsement were as follows:—

Promissory note executed to Hariharam Sankara Narayana Iyan Avergal Irshinarada Mangalam Gramam Kannanoor Paltala Amshom, Palghat Taluq by Ramachandran Ramayyan of the said Gramam. The amount I have borrowed from you is Rs. 800. I do hereby promise to pay on demand the said sum of eight hundred Rupees with interest at the rate of one per cent. a month. Written on 29th Meenam 1074 (10th April 1899). I acknowledge payment of the consideration.

(Signed) RAMACHENDRAYYAN RAMAYYAN.

The amount due under this pro-note must be paid to Kolaththooran Patter's son Venkitachalam Patter of Thaththamangalam Patinharay Gramam. 7th Chingam 1075 (22nd August 1900).

(Signed) A. SANKARANARAYANA IYEN.

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* Second Appeal No. 202 of 1903, presented against the decree of M.R.Ry. T. Venkata Ramaiya, Subordinate Judge of Palghat, in Appeal Suit No. 650 of 1901, presented against the decree of M.R.Ry. M. G. Krishna Rao, District Munsif of Temelprom, in Original Suit No. 897 of 1900.

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RAMA IYEN v. VENKATA-CHELLAM PATTER.

The second defendant pleaded want of consideration for the original document and for the subsequent assignment. The Munsif found that there was consideration for the document but that the assignment was merely nominal and for no consideration. He also held that the document was not a negotiable instrument and holding that the plaintiff had no right to sue and recover the amount in his own name dismissed the suit. On appeal the Subordinate Judge following *Manishunkar Pranjivan* v. *Bai Muli*(1) held that it was not open to the second defendant to raise the plea of want of consideration for the assignment and passed a decree in favour of the plaintiff.

The second defendant appealed to the High Court.

The chief ground of appeal was that Exhibit A, not being a negotiable instrument, could not be transferred by the endorsement on it.

J. L. Rosario for appellant.

T. R. Ramachandra Ayyar for seventh respondent.

C. V. Anantakrishna Ayyar for fourth to sixth respondents.

JUDGMENT.—It is clear that under section 13 of the Negotiable Instruments Act Exhibit A is not a negotiable instrument. It is urged, however, that the endorsement on Exhibit A "The amount due under this pro-note must be paid to Kolaththooran Patter's son Venkitachelam Patter of Thaththamangalam Patinharay Gramam. 7th Chingam 1075" is an assignment. (*Vide* section 130 of the Transfer of Property Act.) This question has not been decided by the Subordinate Judge.

We accordingly direct the present Subordinate Judge to decide the following issue on the evidence on record:—

"Does the endorsement on Exhibit A amount to a valid assignment in favour of the plaintiff?"

The finding should be submitted within three months from this date, when seven days will be allowed for filing objections.

In compliance with the above the Subordinate Judge submitted the following

FINDING.—The issue that I am directed to try in the above case is:—

"Does the endorsement on Exhibit A amount to a valid assignment in favour of the plaintiff?"

(1) I.L.R., 12 Bom., 686.

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Now an assignment is, properly, a transfer of the whole "of a particular estate, the operative verbs being *assign*, *transfer* and *set over*; but other words indicating an intention to make a complete transfer will amount to an assignment" (*vide* Wharton's 'Law Lexicon'). Assignment is also used to denote the transfer of a debt or any beneficial interest in movable property, and no particular words are necessary to effect such a transfer if the intention to transfer is clear from the language used. Now the endorsement in question does not, indeed, contain any words whatsoever to show that the sum due under A has been assigned to the plaintiff. It is on the face of it an order for payment of that sum to the plaintiff and seems to be the result rather of an assignment than an assignment itself; but as the fund which is due to the person ordering and which is ordered to be paid to the plaintiff is very clearly indicated by the following words, viz.:—"the amount due under this pro-note" the order I think operates as an equitable assignment (*vide Row* v. *Dawson*(1) and, II White and Tudor, page 796, sixth edition). In this case Gibson borrowed money of defendants and gave them a draft upon a fund due to him out of the Exchequer which was deposited with the officer from whom the fund was payable, and it was held that the draft was an assignment to defendants.

The endorsement in question is an instrument in writing signed by the transferor. It was indeed not on a stamp; but the necessary stamp duty and penalty have already been levied, and so it is not open to any objection. I find that the endorsement in question is a valid equitable assignment in favour of the plaintiff.

After the return of the finding of the Lower Appellate Court upon the issue referred by the High Court for trial, their Lordships delivered the following

JUDGMENT.—On the issue sent down, the Subordinate Judge finds that the endorsement on Exhibit A amounts to a valid assignment.

Mr. Rosario takes objection to the finding, but we think the Subordinate Judge's conclusion is right.

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(1) 1 ves 331.

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RAMA IYEN v. VENKATA-CHELLAM PATTER.

The transfer set up is effected by a simple direction in writing to pay the amount of the instrument to the plaintiff, endorsed upon the instrument itself. Mr. Rosario contends that this does not necessarily import a transfer of interest, but we think that when the direction to pay is endorsed upon the instrument itself so that both are handed over together to the endorsee the intention to effect a transfer must be inferred.

There is nothing in the document here to suggest, as there was in the case of *Brandts, Sons & Co.* v. *Dunlop Rubber Co. Limited*(1) upon which Mr. Rosario relies, the existence of any arrangement previous to the endorsement between the payee of the note and the plaintiff of a nature different from an agreement to transfer a debt. There is a simple direction to pay the plaintiff and not as there, a request by a creditor of the defendants asking them to sign an undertaking to pay to the plaintiffs 'for account of' the creditor the sums due by them to him.

Accepting the finding, we dismiss this second appeal with costs of the seventh respondent.

(1) L.R., 1904, 1 K.B., 387.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

SHEIK MAHAMAD RAVUTHAR (FIRST PLAINTIFF), APPELLANT,

1906. August 17, 20, 21. September 5.

v.

THE BRITISH INDIA STEAM NAVIGATION COMPANY (LIMITED) BY ITS MANAGING AGENTS MESSRS. MACKINNON MACKENZIE & CO., AND OTHERS (DEFENDANTS), RESPONDENTS.*

Negligence, what amounts to Bill of lading, construction of.

M shipped 4,000 bags of rice in the S.S. *Thorndale* belonging to B for delivery at Tuticorin under a bill of lading, which contained amongst others the following condition :—

" The Company is to have the option of delivering these goods or any part thereof into receiving ship or landing them at the risk and expense of the shipper or consignee as per scale of charges . . . . and is also to be at liberty until delivery to store the goods or any part thereof . . . . In all cases and under all circumstances, the liability of the company shall absolutely cease when the goods are free of the ship's tackle and thereupon the goods shall be at the risk, for all purposes and in every respect of the shipper or consignee."

The ship arrived at Tuticorin on the 23rd October and began discharging goods on the 24th. Heavy rains commenced on the 27th and continued till the 30th, but the discharge of the goods was not stopped and continued till the 30th. The bags got wet while being landed and became damaged by remaining on the foreshore without being immediately removed by M.

M sued B for damages for the bags damaged and lost. It was found that the damage might have been averted if the bags had been removed by M immediately on their being landed and it was also found that B had not taken any precautions to protect the bags. On the above facts,

Held, that B was bound to take reasonable care and that his landing and stacking the goods uncovered on the foreshore during rainy weather amounted to actionable negligence.

Per SUBRAHMANIA AYYAR, J., that the first of the two conditions in the bill of lading did not apply to the landing of the goods and that the second condition did not exempt the defendants from liability for negligence as bailees till actual delivery on land.

Per MILLER, J., *per contra*.—The second condition in the bill of lading applied to all stages of the transaction covered by the contract, including the stages of landing and storing and the defendants were thereby exempted from liability for their negligence on such operations. If the second condition should be struck out, the defendants will still be protected from liability by the first condition.

* Second Appeal No. 97 of 1904, presented against the decree of W. W. Phillips, Esq., District Judge of Tinnevelly, in Appeal Suit No. 85 of 1902, presented against the decree of M.R.Ry. S. Doraiswamy Ayyangar, Subordinate Judge of Tinnevelly, in Original Suit No. 7 of 1901.

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SHEIK MAHAMAD v. THE BRITISH INDIA STEAM NAVIGATION COMPANY.

SUIT for damages for loss sustained by the plaintiff owing to the negligence of the first defendant in landing and storing bags of rice shipped by the plaintiff in a vessel belonging to the first defendant.

The facts necessary for this report are set out in the judgment.

The lower Courts dismissed the plaintiff's suit.

Plaintiff preferred this second appeal.

P. R. Sundara Ayyar, *V. C. Seshachariar* and *K. Kuppuswami Ayyar* for appellant.

Mr. *D. Chamier* for respondents.

JUDGMENT (SUBRAHMANIA AYYAR, J.).—This is a suit for the recovery of Rs. 2,400 odd, the value of 246 bags of rice, being part of the rice shipped in Rangoon, in the S.S. *Thorndale*, belonging to the first defendant company for delivery at the port of Tuticorin to the second and third plaintiffs, agents of the first plaintiff. The goods arrived at Tuticorin and were landed by the company and placed on the foreshore. About 1,098 bags of rice out of the total cargo, belonging to various parties, brought by the ship and placed on the foreshore, were destroyed under the orders of the Municipal authorities on the ground that they had become damaged by rain and unfit for consumption. Among them were the bags with reference to which the present claim is made. That the bags became damaged by rain and liable to destruction is not disputed. Admittedly the monsoon set in from the night of the 27th October, and it continued to rain heavily off and on up to the 30th idem. The landing of the rice cargo had, no doubt, commenced on the 24th, but it was continued even after the rains had set in and until the 30th. Though some default was imputed to the plaintiffs, the District Judge's opinion must be taken to be in their favour, for while he thought there was apathy and negligence on the part of the consignees speaking generally, he found it impossible to say that the plaintiffs themselves were among those that were in any way to blame. As regards the charge of negligence against the company the District Judge expressed himself thus:

"There is no evidence that the cargo was put out of the ship "during rain, but if it happened to begin raining while the boats "were between the ship and shore, the boats naturally went on. The "wetting received by the bags in these circumstances would have "caused no damage had the consignees taken delivery at once. "The damage was caused on the foreshore, and the fact that the

"bags had to stay there a long time was entirely due to the "negligence of consignees, for defendants did all they could to "clear the cargo quickly."

Reading these observations with the conclusion of the Judge that it was impossible to find negligence on the part of the plaintiffs themselves, the only possible view with reference to the bags in dispute is that they, having got wet while being landed, were allowed to remain on the foreshore in such a condition that the wetting ultimately resulted in their being completely damaged, and this without any default on the part of the plaintiffs. The other matters relevant in this connection are (1) that after the bags in question left the ship nothing was done by the company to protect them from exposure to rain either during transit or on the foreshore, and (2) that the company are unable to show the specific date or dates on which they were landed and, if stacked at all, when that was done so as to enable the plaintiffs to take delivery.

In these circumstances I am of opinion that the company, in landing the goods as they did without precautions to prevent damage to them, failed to take the same care of the plaintiff's goods as a prudent person would, in similar circumstances, have taken of like goods of his own, and that the damage was therefore the result of the company's negligence.

The question, therefore, is whether the company is exempted from liability by the terms of the bill of lading. Mr. Chamier, on behalf of the company, relied, in support of his contention that they were not liable, on the exception contained in the body of the instrument as to "accidents, loss or damage from "any act, neglect or default whatsoever of the Pilot, Master or "Mariners or other servant of the company" and also upon the following passage in the concluding part of paragraph 9 of the conditions appearing at the foot of the bill of lading: "In all cases "and under all circumstances the liability of the company shall "absolutely cease when the goods are free of the ship's tackle, "and thereupon the goods shall be at the risk for all purposes and "in every respect of the shipper or consignee."

According to the opening part of the said condition No. 9, it was optional with the company to deliver the goods into a receiving ship, or, as the company did on the present occasion, to land them for delivery at the expense of the consignee on a scale of charges fixed by the company. The bill of lading here is, with one

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exception not material, identical with the bill of lading of the same company which had to be construed in *British India Steam Navigation Company* v. *Ratansi*(1) and the observations of Farran, C.J., at page 187 are applicable. He said: "When examined it will be found to provide(1) for the carriage of the goods on the voyage, (2) for the landing of the goods, (3) for storing them on the wharf or in a godown, and (4) for their delivery: and appropriate exemptions from liability are inserted to cover each stage of the defendants' responsibility."

We are here concerned only with those provisions of the bill of lading which provide for matters arising after the goods leave the ship's tackle and these are exclusively dealt with by the second passage relied on by Mr. Chamier. The liability or non-liability of the company has therefore to be decided not with reference to the exemption relied on in the body of the document, but solely with reference to the other exemption contained in the condition No. 9. *Mitchell* v. *Lancashire and Yorkshire Railway Co.*(2), cited by Mr. Sundara Ayyar, seems to me a clear authority against the construction which Mr. Chamier sought to place upon it. The fact that there the defendants were land carriers makes no difference. The Railway Company, the defendants in that case, notified the consignee of the arrival of some flax and required him to remove it stating that they would hold it "not as common carriers but as warehousemen, at owner's risk and subject to the usual warehouse charges." Part of the flax was not taken by the consignee for a considerable time and remained in the station on open ground, there being no warehouses in the place. They were insufficiently covered and got damaged by wet. Treating the advice-note acquiesced in by the consignee as the contract between the parties, it was held that the company was liable for negligence. The following observations of Blackburn, J., are much in point:

"I take it the law is very clear to this extent, that where a "carrier receives goods to carry to their destination with a liability "as carrier (except so far as that duty is qualified by exceptions), "he may be said to be an insurer. The goods are then to be "carried at the risk of the carrier to the end of the journey, and "when they arrive at the station to which they were forwarded, "the carrier has then complied with his duty when he has given

(1) I.L.R., 22 Bom., 184. (2) L.R., 10. Q.B., p. 256.

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"notice to the consignee of their arrival. And after this notice "if the consignee does not fetch the goods away, and becomes *in* "*mora*, then I think the carrier ceases to incur any liability as "carrier, but is subject only to the ordinary liability of bailee. "There are several cases in which the question has been very much "discussed as to when a carrier's liability ceases as an insurer and "his liability is changed into that of warehouseman. . . . But "I do not think there has been any case decided to this extent that "because the owner of goods was idle and blameable for leaving "them in the carrier's hands therefore he as bailee held them under "no responsibility whatever. . . . I think that the words of "that note mean to point out that they (the company) would hold "them as warehousemen and therefore they would be bound to "take care of them; and at the owner's risk so far as this, that "they did not hold as carriers with a liability as absolute insurers "(pages 260 and 262)."

This advice-note differed from the condition in the present case in that the note in terms stated that the carrier's liability had ceased and that the holding was only in the character of warehousemen. That no such sharp line is drawn in the present case by the provisions under consideration is not a circumstance making the case of the company better. It is well established that general words of this description used by a carrier are to be taken as far as possible against him. *Taubman* v. *Pacific Steam Navigation Co.* (1) cited by Mr. Chamier no doubt seems to go the other way, but, assuming that the language of the contract there is not more specific than that of the condition here, it would, if undistinguishable on the ground that it related to passengers' baggage, be a decision difficult to follow as not conforming, as suggested in Beven on 'Negligence' (p. 1178), to the rule just stated, according to which ambiguous expressions employed by a company for the purpose of limiting their common law liability have to be construed against the company. Be this as it may, having regard to the later case referred to above which in many respects bears a closer resemblance to the present instance, I am of opinion that the defendants here are not by the passage in the condition relied on exonerated from liability for the negligence established against them. The passage might be taken as going the length of

(1) 26 L.T., 704.

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supporting the company's present contention, if on the goods leaving the ship's tackle, they had altogether passed out of the company's charge. But that was clearly not the case inasmuch as there was no delivery by the ship's side but only a transit of the goods for delivery on land. Until their duty to deliver in this way was discharged, the company's possession continued. To say that during such possession they held the property in one character or another, but without the responsibilities incidental to such character under the law, would be, to say the least, spelling out of the indefinite expression "at the risk for all purposes and in every respect," an agreement which, if intended to be made, should be in language so explicit as to exclude any other meaning. For, if the general words here are to be read in the comprehensive way suggested on behalf of the company, they would exempt them from wilful misconduct on the part of the company's servants. Except when the words leave no option to the Court to construe them as otherwise than making out an agreement that the party holding the goods in a legal character contracts not to be responsible for a breach of any of the incidents attaching to it in law, the agreement should, I think, be taken to provide only for some definite matter or matters in connection with the legal relation subsisting between the parties to the agreement. This is implied in the decision in *Mitchell* v. *Lancashire and Yorkshire Railway Co.*(1). Hence the only tenable view seems to be that the passage in the condition in question puts an end to the company's liability as carriers when the goods leave the ship's tackle and constitutes their subsequent possession until delivery as that of bailees.

In this view it is unnecessary for me to consider whether, if the passage in question were to be construed as operating to exonerate the company from all possible liability—even for wilful misconduct on the part of their servants—such an agreement would be sustainable in law.

I would accordingly allow the appeal, reverse the decree of the lower Courts and grant the relief prayed for with costs for the plaintiffs throughout.

MILLER, J.—I think, having been found to have landed and stacked the rice upon the foreshore during heavy rains, without taking any precaution to protect the bags, the defendants should

(1) L.R., 10 Q.B., 256.

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have been held by the District Judge to be guilty of negligence. It is not shown that they had any cargo of their own to land on this occasion, and it is found that they lent to the consignees all the tarpaulins which they had and that they did what they could to expedite the removal of their property by the consignees, but these facts would not exonerate them. They are negligent if they did not take reasonable care, and the stacking of bags of rice uncovered on the open foreshore exposed to rain is not *primâ facie* taking reasonable care. The District Judge's finding must be taken to be that the plaintiffs were not guilty of negligence. Unless then they are protected by the bill of lading the defendants are liable.

My view of the bill of lading is this. The general exception of negligence will apply to all stages of the transaction covered by the contract, and is not restricted to that stage during which the goods are actually in the ship (Compare *Hassanbhoy Visram* v. *The British India Steam Navigation Co., Ltd.*(1) and *Jellicoe* v. *The British India Steam Navigation Co.*,(2), but if there is a special clause dealing with a particular stage of the transaction that must be applied, to the exclusion of the general exeption (Compare *British India Steam Navigation Co.* v. *Ratansi*,(3). Here the stage of landing and storing is covered by the comprehensive condition freeing the company from all liability in all cases after the goods have left the ship's side. Such a condition is intended evidently to exclude all other conditions less wide and comprehensive than itself, and must be taken to be the sole condition in the bill of lading governing the landing of, and subsequent dealing with, the cargo so long as it stands in the bill of lading. I say the sole condition, because it seems to me that the sentence immediately following: "And thereupon the goods shall be for all purposes and in every respect at the risk of the shipper or consignee" does not constitute a second condition but merely reiterates and explains the first.

Now the condition runs as follows:—"In all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle, and thereupon

(1) I.L.R., 13 Bom., 571. (2) I.L.R., 10 Calc., 489.
(3) I.L.R., 22 Bom., 184.

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the goods shall be for all purposes and in every respect at the ris of the shipper or consignee."

If this condition gives clear and unambiguous expression to a stipulation made by the one party to the contract and accepted by the other, we are, to use the words of Cockburn, C.J., in *Stadhard* v. *Lee*(1) bound to give effect to that stipulation, without stopping to consider how far it is reasonable or not. There does not seem to be here any ambiguity in the stipulation. In the case of *Mitchell* v. *Lancashire and Yorkshire Railway Co.*(2) relied on by Mr. Sundara Ayyar, Field, J., felt himself bound to construe the words "at the sole risk of the owner" in the contract before him as subject to the expressed admission that the company held as warehousemen, *i.e.*, "under a known character and definition." And Lord Blackburn's judgment proceeded principally on the ground stated at the bottom of page 261 of the report, where he said: "What we have to consider is, whether defendants can have the benefit of receiving warehouse rent without any liability whatever, for that is what Mr. Herschell's argument came to. We are to be paid warehouse rent and keep them as warehousemen but we are not bound to take any care of them at all. It is but reasonable to suppose that if the defendants meant to express any such thing as that it should have been expressed clearly and distinctly"; and the learned Judge was unable to import the meaning contended for into the words 'at owner's sole risk.' Here there is no ambiguity that I can see. The words though general are perfectly distinct and clear. The company does not say that it will holdas warhousemen or under any other "known character and definition." It says simply that it will take absolutely no liability in any case or under any circumstance once the goods have left the ship, and that from that time all risk for all purposes and in very respect shall be upon the owner. I do not think that anything can be clearer than this. It no doubt involves the position to which Lord Blackburn adverted, that the defendants repudiate liability while charging landing charge and storage rents. But the repudiation is distinct and clear here and not qualified by any undertaking, and however much I may endeavour to read their words against the company, I cannot read into them an admission

(1) 32 L.J.Q.B., 75 at p. 77. (2) L.R., 10 Q.B., 256.

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of any liability whatever for loss or damage done to the goods while being landed or stored. Would a shipper reading this bill of lading think that he had any protection in the landing of his goods under it? Surely he could not do so.

This case is, I think, practically on all fours with the case of *Taubman* v. *Pacific Steam Navigation Co.*(1), in which the defendants were exonerated from liability for loss by negligence of a passenger's luggage. Mr. Beven in his work on 'Negligence in Law' (2nd Edition, p. 1310, footnote) suggests that that case might not be followed in England, and would certainly not be followed in America, but if that be so the reason so far as I can see would be that the defendants could not be allowed to contract themselves out of all liability. In the case of *Le Blanche* v. *London and North Western Railway Co.*(2), to which the learned author refers in his note, the Court does not refer to and does not seem to me to throw doubt on *Taubman* v. *Pacific Steam Navigation Co.*(1). There was an affirmative contract by the Railway Company to do what they could to ensure the punctual running of the trains, and reading this as a part of the contract, the Court held that the further condition repudiating responsibility for delay or detention could apply only to such delays and detentions as were not due to the company's default. That is reasonable enough but is not the case of *Taubman* v. *Pacific Steam Navigation Co.*(1), where the contract was that the company would not be liable for the loss of luggage under any circumstances.

It may no doubt be that the carrier ought not to be allowed to absolve himself from all liability for negligence, and here Mr. Sundara Ayyar contended that the condition which I am considering should be struck out of the bill of lading on that ground, *i.e.*, as being contrary to public policy. It may be open to us to reject it on that ground, but not, I think, on the ground that it does not clearly repudiate all liability.

But it is not necessary for me to decide whether or not we can allow the condition to stand as part of the bill of lading, for if it be rejected the contract to carry and deliver does not thereby fail, and in my view of the bill of lading which I have stated above, if the footnote is struck out the general exception will come into

(1) 26 L.T., 704.

(2) 1 C.P.D., 286.

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operation and the company will be protected against the negligence of its servants.

It has been frequently held that an exception against negligence is valid if clearly expressed and the cases in *Jellicoe* v. *The British India Steam Navigation Co.*(1) and *Hassambhoy Visram* v. *The British India Steam Navigation Co., Ltd.*(2) are authorities in India to that effect, from which I am not prepared to express dissent.

If then the condition as to the landing be struck out, the general exception of negligence will protect defendants, and if the condition be allowed to remain the defendants are protected by it. In either event the second appeal fails and I would dismiss it with costs.

Under section 575 of the Civil Procedure Code the judgment of the Hon'ble Mr. Justice Miller prevails and the second appeal is dismissed with costs.

Solicitors for respondents—Messrs. *Orr, David & Brightwell.*

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Benson and Mr. Justice Wallis.

1906. September 5, 25.

SUBBA NARAYANA VATHIYAR AND OTHERS (PETITIONER-PLAINTIFF AND HIS LEGAL REPRESENTATIVES), APPELLANTS,

v.

RAMASWAMI AIYAR (RESPONDENT-DEFENDANT), RESPONDENT.*

Negotiable Instruments Act XXVI of 1881, *ss.* 8, 78—*In a suit by a payee named in a negotiable instrument or an indorsee, plea that such payee or indorsee is benamidar not allowable.*

According to the law merchant which governed negotiable instruments in this country before the passing of the Negotiable Instruments Act, no person could sue on a negotiable instrument unless he were named therein as payee or unless

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(1) I.L.R., 10 Calc., 489. (2) I.L.R., 13 Bom., 571.

* Appeal No. 88 of 1904, under section 15 of the Letters Patent, presented against the judgment of Mr. Justice Subrahmania Ayyar in Civil Revision Petition No. 401 of 1903, confirming, under section 575, Civil Procedure Code, the decree of L. C. Miller, Esq., District Judge of Salem, in Small Cause Suit No. 10 of 1902.

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he had become entitled as endorsee or bearer. Sections 8 and 78 of the Negotiable Instruments Act have reproduced the law as it stood before the passing of the Act. The general provisions of the Indian Contract Act as regards the rights and liabilities of undisclosed principals were not intended to alter these well established rules as to negotiable instruments. In a suit on a negotiable instrument by the payee named therein or the indorsee, it is not open to the defendant to plead that such payee or indorsee is a mere benamidar.

Ganapati Naiken v. *Saminatha Pillai*, (C.R.P. No. 578 of 1895), unreported.

Gurumurti v. *Sivayya*, (I.L.R. 21 Mad., 391), overruled.

SUIT on a promissory note executed by the defendant and made payable to the plaintiff or his order. The defendant pleaded that the plaintiff was only benamidar for one K, who had advanced the consideration for the promissory note and the amount had been duly paid to K.

The District Judge received oral evidence in support of this plea and dismissed the suit.

The plaintiff preferred a civil revision petition to the High Court. There was a difference of opinion as to the sustainability of the defendant's plea and the judgment of the District Judge was upheld.

Plaintiff appealed under section 15 of the Letters Patent.

T. Subrahmania Ayyar for appellants.

C. Venkatasubbaramiah for respondent.

JUDGMENT.—This is an appeal under section 15 of the Letters Patent from an order of this Court refusing to revise the appellate judgment of the District Court in a suit on a promissory note. The suit being of a small cause nature no written statement was filed by the defendant, but it appears from the judgment of the District Judge that the question before him was, whether the defendant was entitled to give evidence to show that the promissory note was not really executed in the plaintiff's favour, although he was the payee named in the note, in support of a plea that the note had been discharged by payment to the person really interested. The District Judge held the evidence admissible and dismissed the plaintiff's suit. In this Court there was a difference of opinion, Subrahmania Ayyar, J., holding that the District Judge was right while Davies, J., considered that the defendant was precluded by the terms of the Negotiable Instruments Act from denying the payee's right to sue. The question whether it is open to the defendant in a suit on a negotiable instrument to plead that the payee named in the instrument, or the indorsee, as the case may be, is a mere

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benamidar and not entitled to sue is one of considerable importance, and must in the first place be considered with reference to the terms of the Negotiable Instruments Act which, if applicable, are, of course, decisive. In our opinion sections 78 and 8 are clearly applicable, and it depends on the construction of these sections whether the question is concluded by the Act. Section 78 provides that subject to the provisions of section 82(*c*) which do not apply here, "payment of the amount due on a promissory note must, in order to discharge the maker, be made to the holder." These provisions are imperative and in our opinion preclude the maker when sued on the instrument from pleading discharge by payment to any one but "the holder." "Holder" is defined in section 8 as "any person entitled in his own name to the possession of the note and to receive or recover the amount due thereon from the parties thereto." Having regard to the prevalence of benami transactions in this country, that is, to the practice of acquiring property or rights in the name of another, we consider the use of the words "entitled in his own name" in the definition of "holder" most significant, and that they were inserted by the legislature for the purpose of preventing any one from claiming the rights of a "holder" under the Act on the ground that the ostensible holder was a mere benamidar. The respondent's vakil has been unable to suggest any other meaning for the words "in his own name" which would not render them wholly superfluous. We find that the same construction has been put upon these words in Calcutta in *Sarat Chunder Dutt* v. *Kedar Nath Dass*(1) decided by Banerjee and Rampini, JJ., a case which is not referred to in the judgments of our learned brothers and does not seem to have been cited before them. It was there held on a consideration of the language of section 8 that it was not open to the defendant in a suit by the indorsee on a negotiable instrument to set up that the indorsee was a mere benamidar, and this Court has come to a similar conclusion but without discussing the language of section 8 in *Bojjamma* v. *Venkataramayya*(2) and other cases to which we shall refer later. In connection with the words "entitled in his own name" in section 8 we may refer to the use of the words "in his name" in section 27 which provides that "every person capable of binding himself or being bound on a negotiable instru-

(1) 2 C.W.N., 286.

(2) I.L.R., 21 Mad., 80.

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ment may so bind himself or be bound by a duly authorized agent acting in his name." It is of the essence of a code that it should be exhaustive, and we think that the effect of this section is that the principal can only be made liable through his agent on a negotiable instrument when the agent acts as here prescribed in his (the principal's) name, that is, when he signs as agent, and that, as held by this Court decided under the Act (*Paramasiva Mudali* v. *Kannimuthu*(1)) an undisclosed principal cannot be sued on a negotiable instrument.

Another reason for referring to section 27 as well as to sections 8 and 78, is that in our opinion these sections reproduce the pre-existing law, as was to be expected in a codifying Act. We think that before the passing of the Act negotiable instruments were governed in this country as in England by the law merchant, and as stated in Leake on 'Contracts,' 4th edition, page 337, "according to the law merchant no person could be sued unless he appeared as party by name or designation on the face of the instrument; nor could any person sue unless he were named therein as payee-promisee or unless he had become entitled as indorsee or bearer." We cannot find any English case in which an undisclosed principal has attempted to sue on a negotiable instrument, and we think that the decisions clearly established that an undisclosed principal could not be sued. In *Miles' Claim*(2), Lord Justice James said that it had always been the law in England that nobody is liable upon a bill of exchange unless his name or the name of some partnership or body of persons of which he is one appears on the face or on the back of the bill and Lord Justice Mellish shows that *Edmunds* v. *Bushell*(3) is not in any way opposed to this rule. *Lindus* v. *Bradwell*(4) where a husband acknowledged his wife's signature has been treated, we think rightly, as a case of signature by the husband in an assumed name, and does not warrant the proposition that an undisclosed principal may be sued on a negotiable instrument. The rule that undisclosed principals could not sue or be sued on bills or notes was, as pointed out by Leake, an exception from the rule which allowed an undisclosed principal to sue and be sued on contracts not under seal made by the agent in his own name. We think this rule was not extended to bills and

(1) S. A. No. 182 of 1891 (unreported). (2) L.R., 9 Ch., 635.
(3) L.R., [(1865) 1 Q.B., 97.] (4) [(1848) 5 C.B., 583.]

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notes, not so much because of their analogy to deeds, as because they were governed by the law merchant representing the usage of merchants throughout the western world, and because in the case of instruments intended to be negotiable and to pass from hand to hand usage and policy alike required that the real contract should appear on the face of the instrument. We do not think that the general provisions of the Indian Contract Act, 1872, as to the rights and liabilities of undisclosed principals were intended to alter well-established rules as to negotiable instruments which in our opinion continued to be governed by the law merchant based on general mercantile usage.

The provisions of the Bills of Exchange Act, 1882, also appear to be in accordance with the view we have taken. Under section 59 a bill is discharged by payment in due course which by the section is payment to a "holder" and holder is defined in section 2 as "the payee or indorsee of a bill or note who is in possession of it or the bearer thereof," while as regards the payee section 7 (1) provides that in "a bill not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty." On the other hand, the non-liability of an undisclosed principal on a bill or note is expressly provided for by section 23.

In America the new Negotiable Instruments Law printed in the appendix to Mr. Daniell's work on negotiable instruments which has been adopted by twenty states of the American Union including New York, Massachusetts and Pennsylvania appears to reproduce in this as in most other respects the provision of the Bills of Exchange Act and may, in our opinion, be regarded as representing the preponderance of authority in America; see sections 2, 37, 148, 200. With regard to American case law, paragraphs 1187 and 1188 of Daniell's work referred to by our learned brother appear to go no further than to say that when the payee on the face of the bill is described thereon as agent, the principal may sue, nor do the decisions in the two cases cited by our learned brother appear to go further. On the other hand, we have been referred to paragraph 80 of Mr. Daniell's work where it is said to have been held that parol evidence is not admissible to show that a note was to be paid to some other person than the payee, and to paragraph 93 where it is said that the maker of a note is estopped from showing that the payee was not the real party in interest at the time the note was executed.

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We come now to the Madras decisions since the passing of the Act. In (*Paramasiva Mudali* v. *Kannimuthu*(1)) as already stated it was held we think rightly that an undisclosed principal cannot be sued on a negotiable instrument. In *Ganapati Naiken* v. *Saminatha Pillai*(2) it was held that a benamidar cannot sue on a negotiable instrument and in *Gurumurti* v. *Sivayya*(3) it was held (but without referring to the terms of the Act,) that an infant was entitled to sue by his next friend on a note taken by his mother in her own name on account of his estate. These decisions have not been followed until the present case and must in our opinion be overruled. On the other hand, it was held in *Bojjamma* v. *Venkataramayya*(4) dissenting from *Ganapati Naiken* v. *Saminatha Pillai*(2) that it was not open to the defendant to plead that the payee or indorsee was a mere benamidar, and quite recently it has been held we think rightly in *Ramanuja Ayyangar* v. *Sadagopa Ayyangar*(5) that a minor cannot sue on a promissory note taken in the name of his adoptive mother. The decision in *Krishna Ayyar* v. *Krishnasami Ayyar*(6) as to the liability of the other members of a joint family on a bill accepted by the managing member proceeded upon considerations of Hindu Law and does not affect the present question. We think it unnecessary to discuss the more recent decisions of this Court holding that the assignee of a negotiable instrument to whom it has been assigned otherwise than by indorsement may, when in possession of the instrument, sue in his own name, as there are considerations in such a case which do not arise here.

In the result we allow the appeal and reverse the judgments of the lower Courts, and give judgment for the plaintiff's representatives with costs in this and the lower Courts.

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(1) S.A. No. 182 of 1891 (unreported).
(2) C.R.P. No. 578 of 1895 (unreported).
(3) I.L.R., 21 Mad., 391.
(4) I.L.R., 21 Mad., 30.
(5) I.L.R., 28 Mad., 205.
(6) I.L.R., 28 Mad., 597.

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APPELLATE CRIMINAL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

1906. August 13.

EMPEROR

v.

DORAISWAMY MUDALI.*

Criminal Procedure Code Act V of 1898, sec. 531—Section applies to cases where Magistrate tries in respect of offences committed outside his jurisdiction.

There is nothing in the language of section 531 of the Code of Criminal Procedure to confine its operation to cases where offences committed within the jurisdiction of a Court are tried by such Court outside the limits of the local area of its jurisdiction.

A finding, sentence or order regularly passed by a Court in the case of an offence committed outside its local area cannot be set aside when no failure of justice has taken place.

THE accused in this case was tried by the Assistant First-class Magistrate of Trichinopoly for offences under sections 408, 468 and 471 of the Indian Penal Code. The offences were committed at Peralam in the Tanjore District outside the jurisdiction of the Magistrate. No objection was taken before the Magistrate on this ground and the accused was convicted.

On appeal to the Court of Sessions, the accused contended that the Magistrate had no jurisdiction to try the case. The Sessions Judge held that the Magistrate had acted without jurisdiction and reversed the conviction.

This appeal was preferred to the High Court under section 417 of the Code of Criminal Procedure.

The Public Prosecutor for appellant.

K. S. Gopalaratnam Ayyar for respondent.

JUDGMENT.—The Public Prosecutor has argued this case on the footing that the offence was committed within the jurisdiction of the Sub-divisional Magistrate of Negapatam. The question for our determination is whether the irregularity of this trial by the

* Criminal Appeal No. 182 of 1906, presented under section 417 of the Code of Criminal Procedure, against the judgment of acquittal passed on the accused in Criminal Appeal No. 3 of 1906, by A. M. Slight, Esq., Sessions Judge of Trichinopoly, Criminal Revision Case No. 169 of 1906, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the said judgment of the Sessions Court of Trichinopoly in Criminal Appeal No. 3 of 1906.

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Emperor v. Doraiswamy Mudali.

Trichinopoly Magistrate is cured by the provisions of section 531, Criminal Procedure Code. The Sessions Judge has held that that section covers only cases where the offence committed within the jurisdiction of a Court is tried by that Court outside the limits of the local area of its jurisdiction. We are unable to see anything in the language of section 531 to confine its operation to that limited class of cases. Stress has been laid on behalf of the accused, upon the language of sections 177, 179, 180, 181 and 183, Criminal Procedure Code. These sections, no doubt, define the Courts which ordinarily have jurisdiction to try offences. They should, however, be read with section 531, and the manifest intention of that section is to provide against the contingency of a finding, sentence or order, regularly passed by a Court in the case of an offence committed outside its local area, being set aside when no failure of justice has taken place.

The authorities to which our attention was drawn by the Public Prosecutor are clearly in favour of this view. *Queen* v. *Piran*(1) was a case under the Code of 1872. There it was assumed that a trial by a Court of an offence over which it had no local jurisdiction and which was committed within the local jurisdiction of another Court within the same province would be sustained under section 70 of that Code.

Bapu Daldi v. *Queen*(2) proceeds upon the same presumption. In *Queen Empress* v. *Abbi Reddi*(3) and *Ranyan Kutti* v. *Emperor*(4) it was held that a committal by a Magistrate not having local jurisdiction to commit was within section 531.

The Queen Empress v. *James Ingle*(5) is to the same effect. The hesitation expressed in that case by the learned Judge was apparently due to his perception of the possibility of a failure of justice in the event of a conviction.

We are, therefore, unable to agree with the view of the Sessions Judge. We set aside his order quashing the conviction and direct that the appeal be restored to the file and disposed of according to law.

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(1) 13 B.L.R., App. 4.
(2) I.L.R., 5 Mad., 23 at p. 25.
(3) I.L.R., 17 Mad., 402.
(4) I.L.R., 26 Mad., 640.
(5) I.L.R., 16 Bom., 200.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Benson and Mr. Justice Wallis.

1906. July 24. September 4. November 14, 16.

KESAVARAPU RAMAKRISHNA REDDI (PLAINTIFF), APPELLANT,

v.

KOTTA KOTA REDDI AND OTHERS (DEFENDANTS NOS. 6 TO 9 AND EIGHTH DEFENDANT'S LEGAL REPRESENTATIVES), RESPONDENTS.*

Court Fees Act VII of 1870, s. 7, sched. I, art. I—Appeal, valuation of, when no amount claimed, but dispute about liability of certain properties—Value of such properties—Proper valuation of the appeal.

Section 7 of the Court Fees Act has no application in the case of appeals in which no amount is claimed. Where the appellant in an appeal against a mortgage decree does not dispute the amount decreed, but raises the question of the liability of certain properties for the decree amount, the value of the appeal, for the purpose of Court fees, under Article I of schedule I of the Court Fees Act, is the value of such properties, when such value is less than the amount decreed, and when such value exceeds the amount decreed, such decree amount.

Venkappa v. Narasimha, (I.L.R., 10 Mad., 187), followed.

Krishnama Chariar v. Srinivasa Ayyangar, (I.L.R., 4 Mad., 339), followed.

SUIT to recover Rs. 9,420 due on an hypothecation bond executed in favour of the plaintiff by defendants Nos. 1 to 3. Defendants Nos. 6 to 9 had purchased some of the hypothecated properties. A decree was passed in favour of the plaintiff for the amount claimed against the hypothecated properties, excepting the items purchased by defendants Nos. 6 to 9. The plaintiff appealed on the ground that such properties were wrongly exonerated from liability.

The appeal was valued as follows:—

Memo. of valuation.

	RS.	A.	P.
Suit to recover money under a hypothecation bond. Plaintiff seeks to recover only Rs. 4,000 out of the lands in the possession of defendants Nos. 6 to 9 as the lands are worth only Rs. 4,000. Hence the value of the appeal is	4,000	0	0
Costs which the plaintiff has been asked to pay to ninth defendant	150	8	0
Total value of appeal ..	4,150	8	

* Appeal No. 127 of 1903, presented against the decree of T. M. Swaminadha Ayyar, Esq., District Judge of Nellore, in Original Suit No. 13 of 1902.

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The case came in the first instance before (Subrahmania Ayyar and Benson, JJ.), who made the following

ORDER OF REFERENCE TO THE FULL BENCH.—The amount due under the plaintiff's mortgage on which the suit is brought was over Rs. 9,000. The lower Court's decree declared certain of the lands mentioned in the mortgage claimed by defendants Nos. 6 to 9 (respondents) not liable to be proceeded against for the debt. The plaintiff appeals against this portion of the decree and values his appeal at Rs. 4,150, viz., Rs. 4,000, the alleged market value of the lands exonerated, and Rs. 150 for costs without prejudice to his right to proceed against these and other lands for the entire debt according to the tenor of his mortgage. On behalf of the respondents objection is taken that this valuation is erroneous. This contention is supported by the decision of this Court in *Vasudevan Nambudripad* v. *Kalliyangi Sett*(1) and *Ramasami* v. *Subbusami*(2), apparently rests on the same view, though the facts were not on all fours with those in the present case. In *Venkappa* v. *Narasimha*(3), however, which was an appeal by persons who stood in the position of the present respondents, it was held that the Court-fee payable in such an appeal would be according to the amount of the debt unless the value of the property were less than the debt, and in the latter case according to such value.

The result of these cases is that the subject-matter of the appeal varies as the plaintiff or the defendant, in cases like the present, is appellant.

This apparently involves an anomaly, and having regard to the general importance of the matter, we refer to the Full Bench the question whether the present appeal has been properly valued.

The appeal came on for hearing in due course before the Full Bench constituted as above.

K. Sreenivasa Ayyangar for *P. R. Sundara Ayyar* and *K. S. Rmaswami Sastri* for appellant.

C. V. Krishnasawmi Ayyar for first, second and fourth to sixth respondents.

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(1) Appeal No. 46 of 1903 (unreported).
(2) I.L.R., 18 Mad., 508.
(3) I.L.R., 10 Mad., 187.

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RAMAKRISHNA REDDI v. KOTTA KOTA REDDI.

The Court expressed the following

OPINION.—We are of opinion that the question whether the appeal in the present case has been properly valued is governed by article 1 of schedule I to the Court Fees Act. Assuming that section 7 of the Act applies to the computation of the fee for the purposes of an appeal as well as for the purposes of the plaint, sub-section (i) has no application to the present case, since for the purpose of the appeal in the present case no amount is claimed. The question raised in the appeal is not a question of amount but the question whether the lands claimed by defendants Nos. 6 to 9 are liable to be proceeded against for the mortgage debt. It is not suggested that any other of the provisions of section 7 are applicable to the case. The question, therefore, is what is the value of the subject-matter in dispute in the appeal independently of section 7 of the Act. The amount of the decree is not in dispute, the liability of the lands other than the lands claimed by defendants Nos. 6 to 9 is not in dispute. The question in dispute is the liability of the lands claimed by defendants Nos. 6 to 9 to be proceeded against for the debt. If the plaintiff succeeds on appeal he will no doubt be entitled to proceed against the lands claimed by the defendants Nos. 6 to 9 for the satisfaction of the whole debt, but he can only recover the sale-proceeds of these lands. The lands have been valued at Rs. 4,000 and, unless this valuation is successfully impeached by the respondents, it must, on the principle of the decision in *Krishnama Chariar* v. *Srinivasa Ayyangar*(1) be taken as the value of the subject-matter in dispute in this appeal.

The present case is distinguishable from *Vasudeva* v. *Madhava*(2). In that case it was held that the value of the subject-matter in dispute in appeal must be calculated according to the provisions of section 7 (ix).

Section 7 has no application in the present case.

The principle of the decision in *Krishnama Chariar* v. *Srinivasa Ayyangar*(1) was applied in *Venkappa* v. *Narasimha*(3) and we think that *Venkappa* v. *Narasimha*(3) was rightly decided.

In *Ramasami* v. *Subbusami*(4), there is nothing to show that the mortgage debt was in excess of the value of exonerated property so as to raise the question which we have had to consider in the present case.

(1) I.L.R., 4 Mad., 339. (2) I.L.R., 16 Mad., 326.
(3) I.L.R., 10 Mad., 187. (4) I.L.R., 13 Mad., 508.

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We are unable to agree with the decision in *Vasudevan Nambudripad* v. *Kalliyangi Seit*(1) since, in that case, though this is not stated in the order, the mortgage debt was in excess of the valuation of the exonerated property.

We, therefore, hold that the present appeal has been properly valued.

The case came on for final hearing before (Subrahmania Ayyar and Benson, JJ.) when the Court delivered the following

JUDGMENT.—The Full Bench having decided the question of institution fee in favour of the appellant, we proceed to deal with the appeal on the merits.

We are unable to agree with the conclusion arrived at by the District Judge that the mortgage on which the plaintiff sued was collusive and without consideration, entered into in order to defeat the claims of the sixth and eighth defendants under the decrees held by them against the first defendant.

The evidence is all in one way, and that in favour of the plaintiff's claim. We see no reason whatever to doubt that the promissory notes (exhibits A, B and C series) are documents executed on the dates they bear for money advanced by the plaintiff to the first defendant. The positive evidence adduced in regard to them has been in no way shaken in cross-examination. The opinion of the District Judge against their genuineness rests merely on their supposed appearance—a matter on which no reliance can be placed when opposed to the whole of the uncontradicted evidence in the case. The probabilities are also in favour of this view. The plaintiff is not related to the first defendant, nor is there any reason to think that he would have entered into so grave a conspiracy as is suggested, nor is there any reason why the first defendant should be ready to jeopardise all his property by executing a collusive mortgage for so large a sum. It follows, therefore, that the sum of Rs. 4,586–10–6 payable under the promissory notes (C series) was a debt due to the plaintiff at the date of the mortgage. As regards the remaining sum of Rs. 3,400 and odd, alleged to have been paid for the discharge of other creditors, there is also abundant evidence on the plaintiff's side. The creditors themselves have been called and admit payments to them, and their statements are corroborated by

(1) Appeal No. 46 of 1903 (unreported).

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vouchers granted at the time of payment, some of them were judgment-creditors who certified satisfaction by virtue of the payments spoken to by them.

We are, therefore, of opinion that the mortgage was a *bonâ fide* transaction for consideration. Upon this finding the question for determination is as to the rights of defendants Nos. 6, 7, and 9 and the representatives of the eighth defendant who have purchased some of the mortgaged property in execution of two decrees obtained by the sixth and eighth defendants against the first defendant.

As Mr. Sundaraiyar, on behalf of the appellant, confines his claim against property purchased by the contesting defendants to Rs. 4,000, which is less than the amount of the debt due as aforesaid under the promissory-notes (C series), it is only necessary to consider the argument of respondent's vakil that the plaintiff's mortgage even to that extent should be held not valid as against those defendants in consequence of the attachments before judgment obtained by them in their respective suits.

These attachments, however, were subsequent to the date of the plaintiff's mortgage. No doubt prior to the mortgage, one Pera Reddi, whose judgment debt was paid off by the plaintiff, had attached the properties in execution of his decree, but there is no authority for the contention that the claims of the said defendants became by virtue of their attachments claims enforceable under the attachment made by Pera Reddi. As already stated, Pera Reddi's attachment came to an end by a payment made out of Court to him by the plaintiff on behalf of the first defendant.

There was, therefore, no question of assets realized in execution, and no question of rateable distribution. The plaintiff is therefore entitled to proceed against the property claimed by the contesting defendants to the extent of Rs. 4,000 with costs on that amount in this and in the Court below, and the respondents will pay their own costs.

The decree of the District Judge will, therefore, be modified in this respect.

With the consent of Mr. P. R. Sundaraiyar, we direct that, in the event of the mortgaged property having to be sold in execution, the plaintiff shall, in the first instance, proceed against the parcels other than those purchased by the contesting defend-

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ants as well as those referred to in exhibit II, inclusive of the properties therein stated to have been sold to Raghavalu. If the plaintiff's debt be not satisfied by the sale-proceeds of such parcels, the lands purchased by the contesting defendants may be sold, and out of the sale-proceeds, any sum still due to the plaintiff, but not exceeding Rs. 4,000 with the costs upon that amount be paid to the plaintiff and the balance, if any, shall be paid to the contesting defendants in the proportion of the amounts for which the properties purchased by them may be sold in execution of this decree.

RAMAKRISHNA REDDI v. KOTTA KOTA REDDI.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Benson and Mr. Justice Wallis.

RAMACHENDRAIYAR (PLAINTIFF), APPELLANT,

v.

NOORULLA SAHIB (DEFENDANT), RESPONDENT.*

1906. August 13. September 5. December 20.

Civil Procedure Code Act XIV of 1882, *s.* 586—*No second appeal where unnecessary prayer for declaration in suit of Small Cause nature.*

When all the reliefs which the plaintiff claims in a suit could have been obtained without asking for a declaration, the addition of a prayer for a declaration will not prevent the suit from being of the nature cognizable by a Court of Small Causes within the meaning of section 586 of the Code of Civil Procedure if without such declaration it is so cognizable.

SUIT to enforce acceptance of patta alleged to have been properly tendered by plaintiff to the defendant, and to recover from the defendant Rs. 171–15–10 being the rent and road-cess due for fasli 1310 together with interest at 12 per cent. per annum.

The reliefs claimed were stated in the plaint as follows:—

"The plaintiff, therefore, prays that the Court may be graciously pleased to pass a decree declaring that the plaintiff is the landlord and the defendant the tenant of the under-described lands, that the defendant is bound to accept the patta for fasli 1310 which

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* Second Appeal No. 112 of 1905, presented against the decree of S. Gopalachariar, Esq., District Judge of Salem, in Appeal Suit No. 215 of 1903, presented against the decree of M.R.Ry. T. Rajaram Row, District Munsif of Krishnagiri, in Original Suit No. 227 of 1902.

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was tendered on him and which is presented herewith and to execute a corresponding muchilika, directing the defendant to pay to the plaintiff with further interest and costs Rs. 171–15–10 as detailed hereunder, inclusive of the Khanthayam for fasli 1310 and road-cess and interest, and granting such, and further relief as to the Court may seem fit to award."

The Court of first instance dismissed the suit. On appeal this judgment was confirmed.

Plaintiff appealed.

The case came in the first instance before (Subrahmania Ayyar and Miller, JJ.) who made the following

ORDER OF REFERENCE TO THE FULL BENCH.—A preliminary objection has been taken that no second appeal lies, and Mr. Sivaswami Aiyar relies on the decision of this Court in *Ramanathan Chetti* v. *Anthoni Udayan*(1).

Though the declaration therein sought was not precisely the same as that sought in this case, the decision there would seem to be in conflict with the view that in the present case a second appeal will lie.

Here, there is a distinct prayer for a declaration as to the propriety of the patta tendered, and the District Judge has dealt with the question and embodied his decision upon it in his decree. Stamp duty has not, no doubt, been paid in respect of the declaration prayed for, but on behalf of the appellant reliance is placed on section 7, iv (*c*) of the Court Fees Act and it is urged that no separate duty was payable in respect of the prayer for the declaration. This contention seems, *primâ facie*, well founded. We are unable to say that the prayer for a declaration was inserted in the plaint merely with a view to evade the objection that no second appeal will lie in a suit for rent for an amount under Rs. 500.

Having regard to the practical importance of the point raised, we refer to a Full Bench the question whether a second appeal lies in the present case.

The appeal came on for final hearing in due course before the Full Bench constituted as above.

T. Subrahmania Ayyar for appellant.

The Hon. Mr. *P. S. Sivaswami Ayyar* for respondent.

The Court expressed the following

(1) S.A. No. 719 of 1901 (unreported).

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RAMA-CHENDRAIYAR v. NOORULLA SAHIB.

OPINION.—Having regard to the terms of the plaint in this case we think the plaintiff could have obtained all the relief which he sought in his suit without asking for a declaration. This being so the prayer for a declaration does not prevent the suit being of the nature cognizable in Courts of Small Causes within the meaning of section 586 of the Code.

We are of opinion that no second appeal lies int he present case.

The case came on for final hearing before (Subrahmania Ayyar and Miller, JJ.) when the Court delivered the following

JUDGMENT.—Following the decision of the Full Bench we dismiss the second appeal with costs.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

1906. October 23, 29.

BHAKTHAVATSALU NAIDU AND OTHERS (ACCUSED NOS. 1, 5, 6 AND 9), PETITIONERS,

v.

EMPEROR, RESPONDENT.*

Criminal Procedure Code Act V of 1898, s. 423—Sentence, enhancement of—No enhancement when aggregate period of imprisonment reduced, although fine imposed in addition.

Where the aggregate period of imprisonment awarded on appeal is to any extent less than the period of the original sentence, the fact that a fine is imposed by the Appellate Court is no enhancement of the sentence within the meaning of section 423 of the Code of Criminal Procedure.

Where the Appellate Court reduced a sentence of one month's imprisonment to five days but imposed in addition a fine with two weeks' imprisonment in default:

Held, that the sentence of the Appellate Court was not illegal.

THE facts necessary for this report are set out by (Benson and Miller, JJ.) in the order of reference to the Full Bench which is as follows:—

ORDER OF REFERENCE TO A FULL BENCH.—In this case the Appellate Court reduced a sentence of one month's imprisonment

* Criminal Revision Case No. 324 of 1906, presented under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the judgment of the First-class Sub-Divisional Magistrate of Mayavaram in Criminal Appeals Nos. 28 and 31 of 1906, presented against the conviction and sentence of Second-class Magistrate of Tranquebar in Calendar Case No. 22 of 1906.

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to five days but imposed a fine of Rs. 40 in the case of the first appellant, and of Rs. 20 in the case of the second and third appellants with two weeks' imprisonment in default. It is contended before us that this was an illegal alteration of sentence, and upon the authority of a case in the matter of *Ramasawmi Chetty and another*(1) and in the matter of *Thungavelu Pandaram*(2) this would appear to be so, but there appears to be a good deal of authority the other way and we have resolved to refer the question to a Full Bench as it is one of some importance and frequently arises.

In the matter of *Golla Chenchu*(3) Shephard, J., held that a reduction of the term of imprisonment from three months to two, coupled with the imposition of a fine of Rs. 30 with one month in default was not enhancement but alteration. In *Queen-Empress* v. *Ishri*(4) where the reduced term added to the term of imprisonment in default of paying the fine exceeded the original term, it was held that there was an illegal enhancement. In *Queen-Empress* v. *Chagan Jagannath*(5) the Court followed the ruling of Shephard, J., and observed that a fine is always considered lighter than imprisonment. In *Rakhal Raja* v. *Khirode Pershad Dutt*(6) the Court held that it was a question of fact whether the substitution of a fine for a portion of the term was an enhancement or not, observing that the imprisonment in default ought not to be taken into account, and noticing that even when such imprisonment has been served the liability to pay the fine remains. In the matter of *Ramasawmi Chetty and another*(1) the Appellate Court altered a sentence of one month's imprisonment and Rs. 50 fine with seven days in default, by remitting the imprisonment and imposing an additional fine of Rs. 15 with 15 days in default. This was held to be an illegal enhancement, but no reasons were given, the case was not argued, and the sentence was bad on another ground. This ruling was however followed by Subrahmania Ayyar, J., in the matter of *Thungavelu Pandaram*(2) after hearing argument by an *amicus curiae*.

Under section 423 (1) (*b*) (3), Criminal Procedure Code, the Appellate Court is empowered to reduce the sentence or to alter

(1) Crl. R.C. No. 50 of 1902 (unreported).
(2) Crl. R.C. No. 35 of 1906 (unreported).
(3) Crl. R.C. No. 460 of 1888 (unreported).
(4) I.L.R., 17 All., 67.
(5) I.L.R., 23 Bom., 439.
(6) I.L.R., 27 Calc., 175.

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the nature of the sentence with or without reducing it, but not so as to enhance it. The Court has thus clearly power to alter imprisonment into a fine, but as pointed out in *The Queen* v. *Banda Ali*(1), the legislature has not supplied any standard by which imprisonment can be converted into a precisely equivalent sentence of fine. In this case, therefore, it would appear that the question whether there was or was not enhancement would be a question of fact.

In the present case the question appears to arise whether, in the case of a sentence of fine and imprisonment, a reduction of the imprisonment coupled with an increase of the fine is altering the nature of the sentence within the meaning of the section, as, if not, it is illegal unless it can, on the facts, be treated as a reduction of the sentence. The question we refer is :—" Is the sentence of the Appellate Court in this case illegal ?"

The case came on for hearing in due course before the Full Bench constituted as above.

Mr. *J. C. Adam* for petitioners.

J. L. Rosario for Acting Public Prosecutor *contra*.

The Court expressed the following

OPINION.—For the purposes of the question which has been referred to us it is not necessary to consider whether we should be prepared to adopt the view taken by the Bombay High Court in *Queen-Empress* v. *Chagan Jagannath*(2) and to hold that, when the period of imprisonment in default of payment of the fine plus the period of imprisonment left unaltered by the Appellate Court, is the same as the period of the original sentence, there is no enhancement of the sentence such as would render it illegal having regard to the provisions of section 423 of the Code of Criminal Procedure. We are of opinion that when the aggregate period of imprisonment which the accused may have to undergo is to any extent less than the period of the original sentence the fact that a fine is imposed by the Appellate Court would not in law be an enhancement of the sentence. In a case where such an alteration of the sentence has the effect of rendering it in the circumstances of the case excessive or inappropriate, the interference in revision of a superior Court may be called for.

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(1) 6 B.L.R., App. 95.

(2) I.L.R., 23 Bom., 439.

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As regards the case in the matter of *Ramasawmi Chetty and another*(1) we are unable to adopt the view taken by the learned Judges in that case. As pointed out in the order of reference the case was not argued and the sentence was bad on another ground.

As regards the particular question which has been referred to us we are of opinion that the sentence of the Appellate Court in the case is not illegal.

The criminal revision case came on for final hearing before (Miller and Wallis, JJ.) when the Court delivered the following

JUDGMENT.—In accordance with the decision of the Full Bench we hold that there has been no enhancement and dismiss the revision petition.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

1906. August 24, 27.

THE COLLECTOR OF SALEM (FIRST DEFENDANT), APPELLANT,

v.

PEER BATCHA SAHIB AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2 TO 7), RESPONDENTS.*

Land Revenue Assessment Act (Madras)—I of 1876—'Parties to alienation,' who are —means only the parties to the particular alienation in respect of which the application is made.

The 'parties to an alienation' whose concurrence is necessary for separate registration and sub-division by the Collector under Madras Act I of 1876, are the parties to the particular alienation in respect of which the application is made and not the parties to any transaction which may form a link in the alienor's title. The provisions of the Act are not confined to alienations by the registered proprietor only.

SUIT under section 6 of Madras Act I of 1876 for a declaration that separate registration of certain villages of the Mitta of Kollulratti which stand registered in the names of four brothers,

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(1) Crl. R.C. No. 50 of 1902 (unreported).

* Appeal No. 15 of 1904, presented against the decree of M.R.Ry. S. Gopalachariar, District Judge of Salem, in Original Suit No. 6 of 1903.

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N and three others, ought to be made by the Collector in the name of the plaintiff. The villages in question fell to the share of N at a partition between himself and his brothers. N sold them to the plaintiff, and N and the plaintiff, jointly applied, to the Collector for separate registration. The other brothers whose names were on the Register were served with notices, but did not appear before the Collector. The Collector thereupon held that he could do nothing under the Act, as the brothers had not concurred, and dismissed the plaintiff's petition. Hence this suit. The lower Court granted the declaration prayed for and directed the first defendant, the Collector, to pay the plaintiff's costs.

The Collector appealed against the order awarding costs.

The Government Pleader for appellant.

The Hon. Mr. *P. S. Sivaswami Ayyar* for second to seventh respondents.

T. V. Seshagiri Ayyar for first respondent.

JUDGMENT.—The question is as to the costs of the plaintiff which have been, by the Court below, ordered to be paid to him by the first defendant, the Collector of the District. Under Madras Act I of 1876, the Collector is authorised to order separate registration and sub-division when there has been an alienation of a portion of a permanently settled estate, if the parties to the alienation concur in applying for an order and if objections, if any, taken by other parties interested are disallowed by him.

In the present case the plaintiff claims under an alienation made by the deceased father of the second defendant, and the second defendant who is the representative of the alienor, concurred in the application to the Collector for separate registration and sub-division. The third defendant, who holds a share in the mitta in which the plaintiff is a share holder under his alienation, raised an objection to the separate registration and sub-division of the plaintiff's portion on the ground that the parties had agreed under a partition between the alienor and the other co-sharers to apportion the peshcush payable by each share-holder, and that the amount of peshcush to be fixed by the Collector as payable by the plaintiff ought not to differ from the amount fixed by the agreement.

The Collector without dealing with the objection raised declined to pass orders on the plaintiff's application. The

THE COLLECTOR OF SALEM v. PEER BATCHA SAHIB.

Government Pleader urges that in the circumstances of this case the Collector had no jurisdiction to make the registry and sub-division. His argument was that the third defendant who objected and who was one of theparties in whose name the estate stands registered was, within the meaning of the Act, a party to the alienation, and, as he did not concur, the Collector was not at liberty to proceed further. We cannot accede to this argument. No doubt the partition to which the third defendant and the plaintiff's vendor were parties was a transaction in the chain of title, which the plaintiff would have to make out if any question arose as to his vendor's right to convey, but the third Defendant was clearly not a party to the particular alienation in respect of which the application is made. As pointed out by Mr. Sivaswami Ayyar for the third defendant, the terms alienor and alienee in the Act are reciprocal, and necessarily imply only those parties between whom the reciprocal relation exists.

To accede to the Government Pleader's contention would involve this anomaly that the alienor in the last series of transactions would be alienee in respect of that under which he obtained title, and the term 'alienor' would have to be read as 'alienor—alienee' and so on until the alienation effected by the registered proprietor was reached. Such a construction is inconsistent with the ordinary meaning of the term 'alienor.'

The argument of the Government Pleader proceeds on the assumption that the term 'alienation' refers only to alienation by a person whose name is entered in the Collector's register; but we think there is no foundation for this view, and section 8 of Madras Regulation XXV of 1802, on which the Government Pleader relied, plainly implies the contrary.

We are, therefore, of opinion that the Collector was mistaken in supposing that he had no jurisdiction to effect the separate registry in this case. Under the Act it was his duty to enquire into the objection raised by the third defendant and, if he disallowed it, to grant the plaintiff's application.

We think there was, in these circumstances, some justification for the order of the District Judge making the Collector pay the plaintiff's costs. The Collector was not, however, solely to blame as it was the objection raised by the third defendant which gave rise to the suit. That objection was clearly unsustainable, for the agreement to apportion the peshcush, made between

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themselves by the parties, was not binding on the Government and would have had to be disallowed.

THE COLLECTOR OF SALEM v. PEER BATCHA SAHIB.

We modify the decree of the District Judge by directing that the Collector do pay one moiety and the third defendant the other moiety of the plaintiff's costs in the suit.

The Collector must pay the plaintiff's costs of the appeal.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

ARUNACHELLA CHETTIAR (PLAINTIFF), APPELLANT,

v.

RAMIAH NAIDU AND OTHERS (DEFENDANTS NOS. 1, 2 AND 4), RESPONDENTS.*

1906. August 24, September 4.

Transfer of Property Act IV of 1882, *s.* 106—*Notice to quit—Monthly period of tenancy not necessarily reckoned from date of lease—May be calculated from different date if such was the intention of the parties.*

It is open to the parties to a lease to agree that the monthly period of a tenancy should be reckoned from a date different from that on which the lease is executed and fifteen days' notice to the tenant expiring with the end of a month of the tenancy as so reckoned is a sufficient notice under section 106 of the Transfer of Property Act. Where a lease is executed and the tenant enters on possession and is liable for rent from the middle of a month, but the rent is made payable, not on dates calculated from the date of such lease but at the end of the calendar month, the reasonable inference, in the absence of any thing to the contrary in the instrument, is that for determining when the tenancy was to expire, the parties agreed that the monthly tenancy should coincide with the calendar month.

SUIT to recover possession of land. One S executed on the 13th July 1889 a lease deed in favour of the plaintiff the material portions of which were as follows :—

"My father accepted the lease of the ground mentioned in the undermentioned schedules 1 and 2 from the trustee of the above said temple and executed a rent deed, under which he, and after him, myself, had been enjoying the shops belonging to my

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* Second Appeal No. 567 of 1904, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 657 of 1903, presented against the decree of M.R.Ry. T. Swami Ayyar, District Munsif of Tiruvalur, in Original Suit No. 356 of 1901.

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ARUNA-CHELLA CHETTIAR v. RAMIAH NAIDU.

father, built on the said land and paying rent. Since you are now managing the affairs of the said temple and since I have paid you Rs. 15, being arrears of rent due up to date. I have from this date agreed to pay you a rent of As. 11 per mensem for the land detailed below. I shall pay you at the rate of this As. 11 on the 30th of each month. In default of payment on the due date, I shall pay as aforesaid in six months from that date, the rent that may be due till then. In default of even such payment, I shall remove the roof above, deliver to you the land and pay also the rent. I shall obtain receipt for the rent (paid)."

In 1897 S assigned his right under the lease to the first defendant. Default having been made in payment of rent according to the terms of the lease, the plaintiff gave notice on the 1st August 1901 to the first defendant cancelling the lease and demanding possession at the end of August 1901. The first defendant refused and hence this suit. One of the contentions set up by the first defendant in the lower Court was that the notice was insufficient as the month for determination of the tenancy ought to be calculated from the 13th to the 13th of the succeeding month. The Court of First Instance upheld this contention and dismissed the suit. The portion of the judgment dealing with this point is as follows:—

"Plaintiff ingeniously argued that the tenancy was intended to commence on 1st of each month, as the rent due was payable on the 30th of the month. This is not a necessary consequence. The payment of rent may be so fixed for the sake of convenience, but it is the date of the lease from which the tenancy month commences. Taken by this standard, the 15 days' notice contemplated by section 106 must terminate with the 12th of an English calendar month and as the notices in the present case are not so expressed, I must hold on the authority of the ruling above quoted, that they are bad in law."

This judgment was upheld on appeal by the District Judge.

Plaintiff preferred this second appeal.

C. V. Ananthakrishna Ayyar for *P. R. Sundara Ayyar* for appellant.

K. Sreenevasa Ayyangar for *V. Krishnaswami Ayyar* and *T. V. Gopalaswami Mudaliar* for respondents.

JUDGMENT.—In this case the lower Courts have dismissed a suit in ejectment by the lessor, the trustee of a temple, against the

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lessee on the ground that the notice to quit was bad. The agreement between the parties, exhibit A, does not contain any provision as to notice to quit, but under section 106, Transfer of Property Act in the case of monthly tenancies such as this, the tenant is entitled to fifteen days' notice expiring with the end of a month of the tenancy (*Bradley* v. *Atkinson*(1)). In the present case due notice was given if the monthly tenancy be regarded as ending on the 30th of each month the date on which the monthly rent was payable under exhibit A, but not if the tenancy is to be regarded as beginning on 13th of the month the date of exhibit A. It was perfectly open to the parties to agree that the monthly period of tenancy should be reckoned not from the 13th July the date of the lease, but from another date, and all the Court has to do is to ascertain whether such was the intention of the parties (*Doe d. Holcomb* v. *Johnson*(2), *Doe d. Savage* v. *Stapleton*(3), *Doe d. King* v. *Grafton*(4), *Sandill* v. *Franklin*(5) and *Sidebotham* v. *Holland*(6)). In all these cases, except the last, although the lease was dated in the middle of a quarter and the tenant entered on, and was liable to pay from, such date, the fact that the quarterly rent was payable not on dates calculated from the date of the lease but on the usual quarter days, was held to show the intention of the parties that, for determining when the tenancy was to expire, the tenancy should be deemed to commence not from the date of the lease but from the next quarter day, and that notice to quit must be given accordingly. The usual practice being to adhere to the customary quarter days in yearly or quarterly tenancies it was held that where there was an entry in the middle of one of the customary quarters, and payment of rent from the date of entry, but the parties agreed that rent should be payable on the customary quarter days, this showed an intention to adhere to the usual practice, and notices to quit expiring on one of the usual quarter days were accordingly held good. In *Sidebotham* v. *Holland*(6) the same conclusion would have been come to but for the fact that the express provision that the tenant should hold as tenant from year to year commencing from the date of the lease made it, in the opinion of the Court, impossible to

(1) I.L.R., 7 All., 899.
(2) 6 Esp., 10.
(3) 3 C. & P., 275.
(4) 18 Q.B., 496.
(5) L.R., 10 C.P., 377.
(6) (1895) 1 Q.B., 378.

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hold that the tenancy was to be treated for any purpose as commencing on a later day. In this country the practice of letting this sort of immoveable property on monthly tenancies is so widespread as to warrant the legislature in raising a presumption in favour of monthly tenancies by section 106, Transfer of Property Act. It is also a widespread practice to make the monthly letting to coincide with the calendar month. When then we find an entry takes place in the middle of a calendar month and rent is payable from the date of entry, but the parties agree that the rent should be payable at the end of the calendar month, we think the reasonable inference is that they intended that the monthly tenancy should coincide with the calendar month. In this case the monthly rent for each calendar month is made payable on the 30th of such month, and we think that the fifteen days' notice to quit given by the lessor with reference to this date, and not to the 13th of the month, the date of the lease, is good unless there is something in the written contract exhibit A, as there was in the agreement in *Sidebotham* v. *Holland*(1) which precludes us from giving effect to what we believe to have been the intention of the parties. In our opinion there is nothing, and on the other hand the facts recited in exhibit A are opposed to the inference that it was intended that the monthly tenancy should be deemed to commence from the date of exhibit A. According to the recitals the premises in question had been taken on lease by the father of the executant from the former trustee of the temple to which the properties belonged, and both father and son had paid rent for it to the former trustee. The son should of course have gone on paying rent to the new trustee, but he had apparently not done so and the agreement acknowledges payment by him to the new trustee of Rs. 15 for arrears due on the date of exhibit A, representing more than twenty-one month's arrears at the date of the agreement the 13th July 1889. It is then provided that from this date the tenant shall pay the new trustee the stipulated rent on the 30th of each month. Exhibit A thus partakes of the nature of an attornment by the tenant under the old lease to the new trustee, although it may go further and constitute an acceptance of a new lease determining the previous tenancy. Even if exihibit A creates in law a new tenancy between the parties that would not give rise to

(1) (1895) 1 Q.B., 378.

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the inference that it was intended to alter the date on which the tenancy was to be deemed to commence, and it has been held in analogous cases that where the interest of the lessor determines altogether and the title passes to the remainder man, and the lessee goes on holding under the remainder man, although in law a new tenancy is created, yet in giving notice to quit the commencement of the former tenancy must be looked to *Kelly* v. *Patterrson*(1). It is even more unlikely that the parties to exhibit A who already stood to one another in the relation of lessor to lessee should have intended by exhibit A to create a new tenancy beginning for such purposes as notice to quit on the date of exhibit A.

We are accordingly of opinion that the notice to quit given by the plaintiff in this case was good and we reverse the decision of the lower Courts with costs in this and the lower Courts, and remit the case to the District Munsif to be disposed of according to law on the other issues.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Wallis.

1906. October 10, 11, 22.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, THROUGH THE COLLECTOR OF MADURA (FIRST DEFENDANT), APPELLANT,

v.

VENKATESALU NAIDU (PLAINTIFF), RESPONDENT.*

District Municipalities Act (Madras) IV of 1884 as amended by Act III of 1897, ss. 10, 10-A, 19, 250—Rules 6, 34, 35 and 36 framed by Government under section 250—Election of Councillor invalid under rule 6 if defect existed before election although opinion of Governor in Council expressed after—Finality of the Collector's order under rule 36—Powers of Government under rule 34 exist unless order is passed by the Collector under rules 35 and 36—Rules 35 and 36 apply only when petition presented to Collector—Rules 34, 35 and 36 not ultra vires.

Under section 10-A of the Madras District Municipalities Act and rule 6 of the rules framed under section 250, a person is disqualified from being appointed or

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(1) L.R., 9 C.P., 681.

* Second Appeal No. 1084 of 1904, presented against the decree of H. Moberly, Esq., District Judge of Madura, in Appeal Suit No. 571 of 1903, presented against the decree of M.R.Ry. B. Kristna Row, District Munsif of Madura, in Original Suit No. 531 of 1902.

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elected a Councillor if, before his election, he is convicted of an offence, which, in the opinion of the Governor in Council, disqualifies him from being a Councillor, even though such opinion of the Governor in Council is arrived at after the election.

The refusal by the Governor in Council to remove a Councillor under section 19 for such a conviction is no bar when such Councillor is subsequently re-elected to the invalidation of the election on the ground of such conviction.

Rules 34, 35 and 36 are not *ultra vires*. The rules were validly made in exercise of the powers conferred by section 250 (1); and even if not so, the power to prescribe conditions conferred by section 10, empowers the Governor in Council to make such rules.

Rules 35 and 36 prescribe the procedure to be followed when a petition contesting the election is presented. The word 'then' in rule 35 means 'after such petition is presented to the Collector' and not 'after the Governor in Council has taken action under rule 34.'

The Governor in Council taking action under rule 34 is not confined to putting the Collector in motion under rule 35, but can pass orders himself. Such power is not taken away by the powers conferred on the Collector under rules 35 and 36, but only by an order of the Collector duly passed under those rules on a petition presented to him.

The Governor in Council may take action under rule 34, whether a petition has been presented to the Collector or not.

The fact that the Governor in Council may, under such circumstances by notification, remove the Councillor under section 19 of the Act, does not affect the validity of such rule, which enables him to invalidate the election without a notification.

Per WALLIS, J.—Rules 35 and 36 do not warrant the validity of an election being questioned on the ground that the person elected was likely to bring the municipal administration into contempt without such enquiry as is provided by the rules; and the pronouncement of such disqualificaton by the Governor in Council under rule 34 without such inquiry cannot be supported.

SUIT to declare (1) that the plaintiff is the duly elected Councillor of the Madura Municipality and (2) that the Government Order, dated 30th October 1901, No. 1574 M., Mis., setting aside the plaintiff's election is *ultra vires* and illegal, and to recover damages from the defendants.

The facts necessary for this report are set out in the judgment of the lower Appellate Court which was as follows:—

"On the 20th May 1901 plaintiff was elected to be a Municipal Councillor for the 10th Ward of the Madura Municipality by a majority of the votes of the electors of the said ward, and the result of the ballot was recorded by the Chairman in the manner required by rule 29 of the rules framed by His Excellency the Governor in Council under section 250 (*i*) (*a*) of Madras Act IV of 1884. On the 3rd June 1901, second defendant, who was one of the unsuccessful candidates for election, put in before the Collector

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a petition (exhibit C) challenging the validity of plaintiff's election on the following grounds :—

(*a*) that he had not been duly elected by a majority of votes;

(*b*) that intimidation had been practised at the election and had materially affected the result of the election ;

(*c*) that at the time the election was held plaintiff was not qualified as a candidate ; and

(*d*) that there was such an irregularity in preparation of the lists of persons qualified (*sic*) as to affect materially the accuracy of such list.

Second defendant further alleged that the election of plaintiff would be dangerous to the public peace or order and likely to bring the municipal administration into contempt.

Thereupon the validity of the election was under the Collector's orders inquired into by the Divisional Officer. The Collector reported the result of the inquiry to Government who, on 30th October 1901, passed the following

ORDER.—'The Government agrees with the Collector in considering that the conviction of M.R.Ry. P. R. Venkatasalu Naidu under sections 504 and 352 of the Indian Penal Code for insulting and assaulting one of the candidates at a municipal election at a time when he was Chairman Delegate, implies such a defect of character as unfits him to be a Municipal Councillor and that he was therefore disqualified as a candidate. Government moreover considers that the appointment of M.R.Ry. P. R. Venkatasalu Naidu as a Municipal Councillor is likely to bring the Municipal administration into contempt. His election is accordingly set aside and the Chairman is requested to hold a fresh election.'

This order was subsequently modified by substituting 'section 504' for 'sections 504 and 352' (exhibit F).

Plaintiff contends that the order is '*ultra vires*' and illegal on the following, among other grounds :—

(*a*) the conviction referred to does not imply such a defect of character as unfits the plaintiff to be a Municipal Councillor ;

(*b*) upon the same facts the same Government came to an opposite conclusion in November 1899 ;

(*c*) such an objection could not be taken to the validity of the election held under rule 35 of the rules framed by Government under section 250 (*i*) (*a*) of Madras Act IV of 1884 as amended by Act 3 of 1897 ;

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(*d*) the plaintiff's name being duly registered in the list of persons qualified to be elected under rule 5 of the rules aforesaid, the Government had no power to set aside the election ;

(*e*) the other ground (that the appointment of plaintiff to be a Municipal Councillor is likely to bring the municipal administration into contempt) taken by Government in the Government Order aforesaid is no ground for setting aside the election under the law in the circumstances of this case ; and

(*f*) even if that disqualification should be held to apply, the Government Order is illegal in that no opportunity was given to the plaintiff to explain all matters as required by section 19 of the Act, and no inquiry was held at all as to that ground."

The District Munsif dismissed the suit.

On appeal this decision was reversed and the declaration and damages prayed for by the plaintiff were allowed.

The first defendant, the Secretary of State for India in Council, appealed.

Mr. *C. F. Napier* for the Government Pleader for appellant.

T. Rangachariar for respondent.

JUDGMENT (MILLER, J.).—The plaintiff sued, against the Secretary of State for India, praying for a declaration that he was duly appointed by election a Municipal Councillor of Madura, and that an order of the Governor of Madras in Council, dated the 30th of October 1901, by which his election was invalidated, was *ultra vires* and illegal, and praying further for damages which he estimated at one rupee.

The District Munsif dismissed the suit, but the District Judge, on appeal, made the declaration and awarded the damages prayed for. The defendant appeals.

The question for decision depends upon the construction of portions of the Madras District Municipalities Act of 1884 (as subsequently amended) and of the rules framed under it, some of which the District Judge finds to be *ultra vires* of the Governor in Council.

The order of Government complained of, as modified by a subsequent order, dated the 12th of March 1902, sets aside the election of the plaintiff and directs the holding of a fresh ·tion. It proceeds upon two grounds, both of which must ccessfully attacked if the plaintiff is to succeed in his

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The first ground is that the plaintiff was, at the time of his election, not qualified to be elected, because he had been convicted of an offence of criminal insult and punished under section 504, Indian Penal Code, which offence, in the opinion of the Governor in Council, implied such a defect in his character as to unfit him to be a Municipal Councillor.

The second ground is that his appointment was likely to bring the Municipal administration into contempt.

I take the first ground. The election of Municipal Councillors is provided for by section 10 of the Act and a number of rules purporting to be framed under section 250; and section 10-A lays down certain qualifications for election. Section 19 gives power to the Governor in Council to remove, by notification, a Municipal Councillor from office upon certain specified grounds, one of which is that he was not, at the time of his appointment, qualified under section 10-A.

The plaintiff was, it is not denied, convicted of the offence punishable under section 504, Indian Penal Code, before the election which has been invalidated; and the only question is whether the Governor in Council was acting within his powers in setting aside the election on that ground.

One of the qualifications for appointment, prescribed by section 10-A, is that the candidate shall not be a person who has been convicted of an offence which, in the opinion of the Governor in Council, implies a defect of character which unfits him to be a Municipal Councillor; and this, put the other way, is repeated as a disqualification in rule 6 of the rules for the election of Municipal Councillors, which rule provides also that the disqualification must, to be effective, have existed before the election.

The first argument addressed to us for the respondent is based upon these provisions. It is contended that inasmuch as the Governor in Council did not, before the election of the plaintiff, declare his opinion that the offence, of which the plaintiff was convicted, was a disqualifying offence, there was no disqualification before the election, and consequently the election could not be invalidated. I am unable to accept this argument.

The disqualification is, it seems to me, the defect of character in the candidate. This defect is proved by the commission of the

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offence. The admissible evidence of the commission of the offence is the conviction; and the Governor in Council is the tribunal authorized to decide in each case whether the disqualifying defect of character can be inferred from the nature of the offence committed. There is nothing, so far as I can see, to require the Governor in Council, in order to make his decision effectual, to arrive at it before the election. The decision does not bring the disqualification into existence. It is necessary only to give effect to it. It declares its existence or non-existence, but the proof of such existence is the commission of the offence. If that was before the election, the defect must have existed before the election and that is sufficient to satisfy the proviso to rule 6.

The next argument was that the Governor in Council had, in 1899, expressed an opinion that the conviction of the plaintiff did not imply a defect of character unfitting him to be a Municipal Councillor, and he is not now competent to reverse that judgment.

The facts are that, in June 1898, the conviction was reported by the Collector to the Government, and, in August 1898, the Collector under instructions from the Government informed the plaintiff that a repetition of his conduct at municipal elections would be seriously noticed. In October 1899 certain inhabitants of Madura prayed the Government to declare the plaintiff disqualified to be appointed a Municipal Councillor and to remove him from office under section 19 (1) (ii) and (iv). In December 1899 the Government saw "no sufficient reason to comply with the request of the petitioners."

Assuming that the Collector's letter of August 1898 to the plaintiff has reference to the conviction under section 504, Indian Penal Code, it seems to me that the most reasonable inference to draw from its language is that the Governor in Council considered that the plaintiff *had* done something unfitting him to be a Municipal Councillor, but was prepared to excuse a first offence and allow him to remain in office, provided he did not repeat his misconduct.

Into the order of December 1899 I am entirely unable to read an opinion of the Governor in Council that no disqualifying defect of character had been disclosed. That order simply refused to make a declaration and to direct the plaintiff's removal from office, on the ground that no sufficient reason was shown. The

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possible reasons for this refusal are obviously so many that it would be impossible to infer that any particular one of them must have existed. There is nothing in the evidence to contradict the allegation on this point in paragraph 9 of the defendant's written statement; and that is as likely as not to be a correct interpretation of the Government's proceedings. I am unable, therefore, to find that the Governor in Council has ever expressed an opinion contrary to that declared in the order which forms the ground of this suit.

Then it was contended that, by rules 35 and 36, the decision of this question is left to the Collector whose order is final, and the Governor in Council is not competent to pass any order. Rule 36 operates, so it is contended, as an authority given to the Collector under section 288 to substitute his opinion for that of the Governor in Council, or rather to exercise the power, vested in the Governor in Council, of deciding whether an offence committed by a candidate for election is proof of his unfitness for office.

Assuming this to be so, it seems to me that it is only if the Collector exercises the power and passes an order, that the jurisdiction of the Governor in Council is taken away. It cannot be taken away by the giving to the Collector of an authority to exercise a power. It is taken away by the declaration that the Collector's order passed in so exercising the power shall be a final order. But when, as here, the Collector has passed no order, the power of the Governor in Council is, it seems to me, not affected.

This, however, is not the real difficulty in this part of the case. The question arises whether the Governor in Council has power to pass any order himself, setting aside an election on the ground of want of qualification in the candidate [rule 35 (*b*)]. The power given to the Governor in Council in matters of elections is a power to prescribe rules and conditions (section 10); and the rules prescribed in this regard are rules 35 and 36, which authorise, and in fact require, the Collector to decide questions arising under rule 35 (*b*), while they give no such authority to the Governor in Council. The Governor in Council then has no power to decide the question under consideration, unless such power is conferred by some other rule or by the Act itself.

The provision which, in my opinion, gives the necessary authority is the last sentence of rule 34, which confers upon the

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Governor in Council the power to 'take action himself' on facts affecting the validity of an election. There is no doubt that this provision gives power to take action whether or not a petition has been presented under the first part of rule 34. The power is not confined to cases in which no such petition has been presented; for it may be exercised at any time after the election, and the subsequent presentation of a petition could not, I think, affect it. But the question is "What is the action which can be taken?"

The difficulty arises, to my mind, from the presence of the word 'then' in the opening sentence of rule 35. If this word is to be read to mean "after the Governor in Council has taken action," it would follow, I think, that the action is confined to putting the Collector in motion, and it would be for the Collector, and not for the Governor in Council, to pass orders under rule 36.

It seems to me, however, difficult to put this construction on the word 'then,' and that the more natural interpretation of the rule is to read the last sentence of rule 34 as a parenthesis or a proviso to the first sentence, in which case the word 'then' will be equivalent to the words "after the validity of the election has been questioned by a petition presented to the Collector," and rule 35 will not control the action of the Governor in Council. And I am unable to hold that the action taken in the present case, in which the Governor in Council passed an order invalidating an election on a ground on which it would have been open to the Collector, in his enquiry under rule 35, to invalidate it, was beyond the power of the Governor in Council.

It is true that in this case there was a petition and an enquiry by the Collector through his deputy, and possibly the Collector ought to have passed orders under rule 36, but the action of the Governor in Council is not, as I have pointed out, restricted to cases in which there has been no petition, and the action he has chosen to take here is to pass orders on the Collector's report. It might have been more regular perhaps to have directed the Collector to pass orders himself, but I cannot say that the order passed was on that account *ultra vires* of the Governor in Council.

The learned District Judge holds that the last sentence of rule 34 is itself *ultra vires*, because it is inconsistent with section 19, that is to say, because section 19 itself gives power to remove a Municipal Councillor on the ground that he was not qualified for election. It is probable that he really means that the action taken

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in this case was *ultra vires*, because the object aimed at might have been secured by action taken under section 19, for section 19 does not apply to elections and there are facts affecting the validity of an election which are not touched by that section: bribery, for instance, or fraudulent voting, matters which are left to be dealt with under the wide powers given to the Governor in Council by section 10 and section 250.

It may be that the Governor in Council might have, by notification, 'removed' the plaintiff on the ground that he was not qualified for election, but it would not follow from that that he is unable to take power by rule to invalidate the plaintiff's election on the same ground without a notification. I confess that I do not quite appreciate the value of section 19 (1) (i). The validity of the election, as regards the candidate's qualification, can be tested under the rules, and it seems to me that a candidate who has survived that test, or whose disqualification has been overlooked, might well be allowed to retain his seat once the time for questioning his election was past.

That, however, is a matter on which there may be difference of opinion and all that I have to see is that the order passed in this case was *intra vires* of the Governor in Council.

The learned District Judge is indeed inclined (paragraph 10 of his judgment) to hold that rule 36 is altogether *ultra vires*, in other words, that no election can be invalidated except by way of the removal of the person elected on one of the grounds enumerated in section 19.

That view I cannot accept, and it was not pressed upon us in argument; and Mr. Rangachariar was prepared to admit that rules 35 and 36 were good generally, but contended that the case before us could not properly be brought under those rules because section 250 (1) (*a*) does not provide for a rule of the nature of rule 35 (i) (*b*). I am not prepared to decide that that is so, for it is not clear to me that section 250, clause (1) (*a*) (i), (vi) or (vii) would not cover the case. But even if it be so, the rule may be attributed to the power given by section 10 to prescribe conditions; and if the power is there, the rule is good though it purports to have been made under a different section.

The order so far as it proceeds on the first ground was, in my opinion, *intra vires* of the Governor in Council and not illegal, and the plaintiff's first attack on it must fail.

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This is sufficient to dispose of the appeal, and I need say nothing on the second ground on which the order is based.

I would allow the appeal and reverse the decree of the District Judge, restoring that of the Court of First Instance with costs of the defendant in this and the lower Appellate Court.

WALLIS, J.—It is admitted that the plaintiff was convicted under section 504 of the Indian Penal Code on the 2nd June 1898. Under section 10-A of the Madras District Municipalities Act, such conviction is a disqualification if, in the opinion of Government, it implies a defect of character unfitting him to be a Municipal Councillor; and in the Government Order, dated the 30th October 1901, set out in exhibit D, Government expressed the opinion that the conviction did imply such defect of character and that the plaintiff was disqualified accordingly. It is however objected, in the first place, that it was not open to Government to declare the plaintiff disqualified on this ground, as they had already expressed a contrary opinion. The facts are as follows: On the day of the conviction the Collector wrote exhibit J to Government informing them of it, and subsequently under instructions from Government wrote exhibit M, dated the 1st August 1898, to the plaintiff informing him that a repetition of his conduct at municipal elections, which had already come to the notice of Government, would be taken serious notice of. It was no doubt open to Government at this stage to remove the plaintiff, who was then a Municipal Councillor, from his office under section 19 (1) (ii) if, in their opinion, his conduct implied a defect of character disqualifying him for being a Municipal Councillor, but under the section they were under no obligation to do so; and I do not understand on what ground it can be contended that their omission to remove him under section 19 (1) (ii) in law debarred them from afterwards declaring him disqualified to be elected under section 10-A, at a subsequent election. At the time of his conviction the plaintiff, as appears from his own statements in exhibit N, had still some eighteen months more to serve, and on October 30th, 1899, as appears from exhibit L, when the end of his term was approaching, certain rate-payers of Madura presented a memorial, exhibit K, to His Excellency the Governor praying that the plaintiff might be declared disqualified for election under section 10-A (1) (*e*) on the ground of his conviction, and that he might be removed from office under section 19 (1) (ii) on the ground of such conviction

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and under section 19 (1) (iv) as likely to bring the municipal administration into contempt. The petition having been transferred to the Local and Municipal Department, Government on the 18th December 1899 passed orders (exhibit L) stating that they saw no sufficient reason to comply with the request of the petitioners. On this date the plaintiff's term had expired or was about to expire; he was not then standing for selection and there was no occasion to pass orders under section 10-A or section 19 in regard to him. I do not therefore see how exhibit L can affect the present question. Even if, in August 1898 or December 1899, the Government of the day had expressed an opinion that the conviction was not a disqualifying one, that would not, in my opinion, preclude Government from expressing a contrary opinion when the question arose for their consideration on the occasion of the election in May 1901, because I think that the opinion of Government in section 10-A means the opinion of the Government which is called on at the time of election to say whether a conviction is a disqualification or not. I come to the conclusion, on this part of the case, that Government had not previously expressed any opinion that the plaintiff was not disqualified, and that it would have been immaterial if it had.

Coming now to the grounds on which the District Judge proceeded, I am of opinion that the objections taken by him to the rules passed by Government under the Act for the election of Municipal Councillors are not well founded and that the plaintiff was duly disqualified under them by reason of his conviction. Under section 10 of the Act, appointments by election are made subject to the conditions in section 10-A and also to such rules and other conditions as may be prescribed by the Governor in Council. Again, section 250 (1) enables the Governor in Council to make rules not inconsistent with the Act as to the qualifications of candidates and the removal or disqualification of Councillors or candidates, and as to the conduct of inquiries relating to elections. Seeing that section 10-A expressly declares that persons convicted of offences implying a defect of character are not qualified to be appointed by election or otherwise, I think that Government had power to make rules as to how such disqualification should be ascertained and enforced, and to make the validity of an election dependent on the absence of such disqualification, and that rules 34, 35 and 36 were duly made and not *ultra vires*. The fact that

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under section 19 the Governor in Council can remove a Councillor on the ground that, at the time of his appointment, he was not qualified under section 10-A does not, in my opinion, preclude Government in the exercise of the powers above referred to, from making the validity of the election depend on the absence of ascertained disqualification in the candidate. It has however been strongly argued before us that, even supposing the rules are not *ultra vires*, the plaintiff was not duly disqualified under them. Rules 34 to 36, it was said, provide for an inquiry as to whether the validity of the election is affected by the disqualification now in question, and rule 36 makes the Collector's order in this matter final. The general scope of these rules is to provide for questioning the validity of elections by petitions put in within fifteen days of the date of election, and it is only orders by the Collector on such petitions that are made final by rule 36. Rule 34, however, besides providing for election petitions, reserves the right of the Governor in Council or the Collector himself to take action on any facts affecting the validity of an election which may come to his notice. When the fact of a conviction comes to the notice of the Governor in Council, I think these words authorise him to take action by stating that, in his opinion, the conviction implies a disqualifying defect of character and ordering a new election accordingly, and that he is not restricted to proceeding by enquiry under rule 35. The words "The Collector shall then proceed to enquire" in that rule appear to mean 'after the presentation of a petition,' and similarly the provisions in rule 36 as to the finality of the Collector's orders relate only to orders on petitions. Even in the case of enquiries on petitions under rule 35 I cannot agree with argument that the Government has delegated to the Collector or Divisional Officer holding the enquiry the right to say whether the conviction should disqualify or not. Even supposing Government could, by rules, make such a delegation by virtue of section 288, it has clearly not done so; and in order to find the existence of a disqualifying conviction the officer enquiring under rule 35 would have to ascertain the opinion of Government and decide accordingly. For these reasons I am of opinion that the plaintiff was duly disqualified on this ground and that the appeal must be allowed.

This would be sufficient for the decision of the case, but it seems desirable to deal also with the other ground of disqualification

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which has been argued before us, as it raises a question as to the interpretation of the rules. The Government Order of the 30th October 1901 also purported to declare the plaintiff disqualified on the ground that he was likely to bring the municipal administration into contempt. This is not a disqualification under section 10-A, or rule 6, but is a new disqualification created by rules 35 (*d*) and 36 by analogy to the power of removal in section 19. Under that section the Governor in Council can only remove a Councillor on this ground after giving him an opportunity of explanation, and must record the reasons for removing him. Rules 35 and 36 do not impose any such conditions, but they make this one of the grounds on which the validity of an election may be questioned on an enquiry, and at such enquiry the candidate would have the opportunity of being heard and meeting the facts alleged against him. At the conclusion of the enquiry the Collector is to pass orders and report his decision to Government, which is to pass final orders.

In the present case the petition against the plaintiff's return, exhibit C, contains allegations as to the plaintiff's conduct designed to show that he would bring the municipal administration into contempt, and the plaintiff filed a written statement, exhibit I, by way of answer, but as appears from the evidence and the endorsement on the petition, the Divisional Officer who enquired into the petition under rule 35 refused to go into these allegations as he considered them irrelevant and extraneous to the inquiry he was conducting, and a petition for further enquiry presented by the plaintiff, exhibit N, was not complied with. In my opinion, rules 35 and 36 do not warrant the validity of an election being questioned on this ground without such enquiry as is there provided for, and I think the disqualification pronounced without such enquiry cannot be supported.

On the other ground the appeal must be allowed with costs in this and the lower Appellate Court.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Benson and Mr. Justice Miller.

1906.
October 1, 11.

KESIRAM NARASIMHULU AND OTHERS (DEFENDANTS), APPELLANTS,

v.

NARASIMHULU PATNAIDU (PLAINTIFF), RESPONDENT.*

Hereditary Village Offices Act (Madras)—Act III of 1895, *ss.* 13, 21—*Section* 21 *applies to cases where defendant denies that lands claimed by plaintiff are emoluments.*

The jurisdiction of Civil Courts is excluded by section 21 of the Madras Hereditary Village Offices Act in cases in which the plaintiff sues for lands as emoluments of his office and the defendant resists the claim on the ground that the land is not the emolument of the office.

Such a suit is not the less a suit for emoluments within the meaning of the section because the defendant resists the claim on such ground.

Ravuthu Kounden v. *Muthu Kounden*, (I.L.R., 13 Mad., 41), distinguished.

SUIT to recover possession of land by the plaintiff alleging that he was the holder of the office of karnam in the proprietary village of Sukulam and that the land itself was the emolument of the office.

Further facts necessary for this report are set out in judgment of Miller, J.

The Munsif dismissed the suit; on appeal the decree was reversed and the case was remanded for retrial.

On appeal against the order of remand the Judges differing, the order of the lower Appellate Court was upheld.

The defendants preferred this appeal under clause 15 of the Letters Patent.

V. Ramesam for appellant.

T. Ethiraja Mudaliar for respondent.

JUDGMENT (Sir ARNOLD WHITE, C.J.).—The circumstances in which this appeal comes before us are set out in the judgment which has been written by my learned brother Miller, J., which I have had

* Appeal No. 18 of 1906 presented under section 15 of the Letters Patent against the judgment of Mr. Justice Subramania Ayyar and Mr. Justice Moore in Civil Miscellaneous Appeal No. 91 of 1905, presented against the order of the District Court of Ganjam in Appeal Suit No. 272 of 1904.

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the advantage of reading, and it is not necessary for me to state them. The point for determination is—under the provisions of the Madras Hereditary Village Offices Act, 1895, is the jurisdiction of the Civil Courts excluded in a case in which the plaintiff sues to recover possession of land which he alleges is the emolument of his office of karnam, and the defendant resists the plaintiff's claim on the ground that the land is not the emolument of the office, but is the private property of the plaintiff which passed to the defendant in execution of a decree obtained by him against the plaintiff?

The question turns upon the construction of sections 13 and 21 of the Act. Section 21 excludes certain matters from the jurisdiction of the Civil Courts—amongst others, a claim to recover the emoluments of the office of karnam (under section 4 of the Act "emoluments" includes lands). Reading the words "emoluments of any such office" in section 21 in their ordinary sense, they would, as it seems to me, apply to a case, in which the plaintiff sues to recover lands which he alleges are the emoluments of his office, this being denied by the defendant. The plaintiff's sole ground of action is that the lands sued for are the emoluments of his office, and it seems to me the claim is none the less a claim for the emoluments within the meaning of the section, because the defendant denies that the lands in question constitute the emoluments. The operation of the first paragraph of section 21 is cut down in two ways: first by a proviso to the whole section, and secondly by a proviso, or exception, to so much of the section as ousts the jurisdiction of the Civil Courts to decide a claim to recover the emoluments of any of the offices to which the section refers. The proviso to section 21 saves the jurisdiction of the Civil Courts in one specified case, *i.e.*, a case where the Appellate Revenue authority decides against the defendant's plea that a Revenue Court has no jurisdiction on the ground that no emoluments appertain to the office. In such a case a Civil Court has jurisdiction to set aside the decree of the Appellate Revenue authority on the ground, and only on the ground, that no emoluments appertain to the office.

The proviso, or exception, to so much of section 21 as ousts the jurisdiction of the Civil Courts in the case of a claim to recover the emoluments of the office cuts down the operation of the section by a reference to proviso ii to sub-section (1) of

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section 13. If the case falls within the terms of this proviso, the jurisdiction of the Civil Courts is preserved by the words of the proviso "but such decision, etc." If the case does not fall within the terms of the proviso the jurisdiction, as it seems to me, is ousted by section 21. Proviso ii to section 13 is in these terms:— "When one of the facts in issue in a suit is whether the emoluments of the office consist of land or of an assignment of revenue payable in respect of land, the Collector shall decide the claim on the assumption that only the said assignment constitutes the emoluments; but such decision shall not bar the right of the claimant to institute a suit in a Civil Court for recovery of the land itself." The words "such decision" mean a decision given in a suit in which one of the facts in issue is whether the emoluments consist of land or of an assignment of revenue payable in respect of land. In the present suit this was not one of the facts in issue. The two issues were—

1. Did the lands in question constitute the emoluments?
2. Did the plaintiff hold the office of karnam?

The District Judge was of opinion that although no issue was framed by the Original Court as to what the emoluments consisted of (by which I understand him to mean that no issue was framed as to whether the emoluments consisted of land or of an assignment of revenue), this point appears to have been considered by the Board of Revenue. Even if this were enough to satisfy the terms of the proviso, there is nothing, as it seems to me, to show that the point was considered by the Board. The form of the Board's Resolution of August 20th, 1901, suggests that it was not. The terms of the resolution, to my mind, show beyond reasonable doubt that the only questions which the Board considered were the questions raised in the formal issues. It appears to me that they did not decide the case on the assumption referred to in the proviso that the assignment, as distinguished from the land itself, constituted the emoluments, but on the ground that the plaintiff had made out his case as regards the lands. But they only gave him a decree with regard to the assignment because, in their view, it was not competent for them to do more. I am of opinion that there was no "such decision" within the meaning of the proviso, and that the saving clause to the proviso, which if the proviso applied, would have had the effect of preserving the jurisdiction of the Civil Courts, does not

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apply. It follows that the words in question in section 21 are not qualified by the exception; and the jurisdiction of the Civil Courts is ousted.

On the other hand, it seems to me that section 13 expressly gives jurisdiction to the Collector. As I have pointed out the case, in my opinion, does not fall within proviso ii to sub-section (1) of section 13, and the words at the end of the proviso preserving the jurisdiction of the Civil Courts, do not apply. The words "emoluments of any such office" occur in section 13 and section 21, and I think they must be construed in both sections in the same way, *i.e.*, as including a claim for lands which are alleged to constitute the emoluments of the office. Section 13, subject to the proviso, gives the Collector jurisdiction to decide such a claim whilst section 21, subject to the exception, takes away the jurisdiction of the Civil Courts.

I see no good reason for construing the word emoluments in section 21, as it has been contended on behalf of the plaintiff they should be construed, as limited to emoluments when there is no dispute as to what constitutes the emoluments.

With great deference to Sir Subrahmania Ayyar, I am unable to agree with what I understand to be his view that because the emoluments which are claimed consist of lands the jurisdiction of the Civil Courts is not ousted.

I think the sections were rightly construed by Moore, J.

I would allow the appeal, set aside the order of the District Judge and restore the decree of the Munsif. In the special circumstances of this case I think that each party should bear his own costs up to date.

MILLER, J.—The plaintiff's land was attached in execution of a decree for money against him and, in spite of objection made by him on the ground that its attachment was prohibited by section 5 of Act III of 1895 (Madras) the land being his karnam's service inam, was brought to sale and purchased by the defendant.

He then sued before the Collector for recovery of the land alleging that he was the karnam and the land the inam attached to that office. The Special Assistant Collector found that he was not the karnam and dismissed the suit on that ground. The District Collector on appeal, holding, it would seem, that there was a mistake and finding that the land was admittedly service inam, would, so his judgment suggests, have given the plaintiff a decree

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for the assessment payable on the land, but for the fact that, in his view, the plaintiff had, himself, by contracting debts, in effect alienated the inam, and ought not to be allowed to recover it. The Board of Revenue on second appeal was unable to take this view and gave the plaintiff a decree for which the act expressly forbids a plaintiff to ask, a declaration of his title to the assessment [*vide* section 13 (1) (i)], leaving him to sue if so advised in a Civil Court, to recover possession of the land. Plaintiff armed with this decree, sued in the District Munsif's Court; the defendant denied that the land was service inam land, alleging that it orginally belonged to the plaintiff's family and had duly passed to him (defendant) by the Court sale. The District Munsif held that the Civil Court had no jurisdiction to entertain the claim and dismissed the suit on that ground; but the District Judge, on appeal, remanded it for disposal on the merits. On a second appeal to this Court the learned Judges differed in opinion, and the appeal was dismissed.

By section 21 of the Hereditary Village Offices Act III of 1895, no Civil Court has authority to take into consideration or to decide any claim to succeed to any of the offices specified in section 3 (of which that of karnam is one) or any question as to the rate or amount of the emoluments of any such office, or, except as provided in proviso (ii) to sub-section (1) of section 13 any claim to recover the emoluments of any such office.

By section 13 (1), suits can be brought before the Collector for any of the Village offices specified in section 3 or for recovery of the emoluments attached to any such office, on the ground that the plaintiff is entitled (with reference to the law regulating the succession and appointment of such offices) to hold such office and enjoy such emoluments. And by the second proviso to this sub-section when one of the facts in issue in a suit (before the Collector) is the question whether the emoluments of the office consist of land or of an assignment of revenue payable in respect of land, the Collector shall decide the claim on the assumption that only the said assignment constitutes the emoluments; but such decision shall not bar the right of the claimant to institute a suit in a Civil Court for recovery of the land itself.

The learned Judge whose decision prevailed in the second appeal has held, if I understand him aright, that the suit is not within section 13 (1) and is therefore not cognizable by a Collector's

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Court, and that it must in consequence be cognizable by the Civil Court. It may be granted that all suits not within the terms of section 13 (1) are cognizable by the Civil Courts, for though the words of section 21 are wide enough to embrace all claims for emoluments however grounded, that section must be read (in my opinion) with section 13 so as not to deprive suitor of all remedy in cases not within the latter section.

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But with very great respect for the learned Judge, I am unable to concur in his view that this suit is not within the provision of section 13 (1).

It must be remembered that the land in question was attached and sold in execution of a decree for the plaintiff's debt; the plaintiff does not deny the debt, nor does he seek to set aside the sale on any ground other than the inalienability of the land. He can therefore only succeed by showing (i) that he is the karnam of the village entitled as such to enjoy the emoluments and (ii) that the land for which he sues is the emolument of his office. These must be the grounds of his suit and these are the grounds of suit which give him his right of action before the Collector under section 13 (1).

Is then the present suit excluded from the cognizance of the Collector for the reason that the claim is for land? I think not. Emoluments may be lands (section 4), and there is nothing in section 21 to indicate that such emoluments were intended by the Legislature to be excluded from its operation: the answer to the question must depend upon the construction to be placed upon proviso ii to section 13 (1).

That proviso recognizes the jurisdiction of the Civil Courts to entertain claims for the possession of land, and declares that the plaintiff's right to sue in such Courts shall not be barred by the Collector's decision in a case where he has to decide whether the land or the revenue forms the inam.

Section 21 takes away the jurisdiction of the Civil Courts in suits for emoluments, the case provided for in section 13 (1), para. ii excepted, and one other case also excepted, that in which the defendant pleads before the Collector that his jurisdiction is ousted, because no emoluments are attached to the office in respect of which the suit is brought (proviso to section 21). In this case the Civil Court is empowered to set aside the decree of the Revenue Court.

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Now if the Legislature had intended to save the jurisdiction of the Civil Court in a third case, that in which the plaintiff sues for land as being the emoluments of his office, it would have been very easy to declare that intention and to enact that the Collector should not decree ejectment in any case in which it was denied by the defendant that the land sued for 'appertained' to the inam.

That is not the effect of the second proviso to section 13 (1) which applies in terms only to the special case in which it is found or admitted that the inam is to be taken out of the land sued for, but the plaintiff alleges and defendant denies that the kudivaram as well as the melvaram is a part of that inam.

It is not perhaps easy to discern the object of the Legislature in enacting the proviso in this way, but it may be that the emoluments being secured to the plaintiff, it was considered unnecessary to take away from the Civil Court the duty of determining its precise nature, while in the case before us the emolument itself is in jeopardy, and on that account the decision is placed in the hands of the Court specially appointed for the protection of service inams.

"The main object of the Regulation VI of 1831 appears to have been to prevent the appropriation of the emolument derived from lands and other sources and annexed to various hereditary village and other offices in the Revenue and Police Departments, to purposes other than those for which they were originally designed; and in order to secure the due performance of the services, to prevent any separation of the emoluments from the offices. With a view to accomplish this object, the adjudication of all claims to such emoluments is confined to the Revenue authorities subject to the ultimate control of the Government . . . ."

This passage from the judgment of the Court in *Basappa* v. *Yenkatappa*(1) is applicable to the present Act, the successor of Regulation VI of 1831, and it appears to me that the object of the Legislature might, in some cases, be defeated if the adjudication be not confined to the Revenue Courts in cases in which the inam is undoubtedly land.

It is I think clear that the Board of Revenue and the Government have not interpreted this proviso as taking from the

(1) 4 M.H.C.R., 70.

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Collector the power to decree ejectment, for the rules framed under section 20 provide for delivery of possession in execution of a decree of a Collector by a warrant issued by him. (Board's Standing Orders, edition of 1900, vol. i, app. III, p. 493), and when jurisdiction is given to the Revenue Court it is by section 21 taken from the Civil Courts. The act does not seem to contemplate concurrent jurisdictions. I am unable then to find anything to exclude the present suit from the jurisdiction of the Revenue Courts, provided that it is grounded on a claim for emoluments within the meaning of section 21. It has been contended before us that this is not so and that section 21 must be confined to suits in which the subject matter is admitted to be the emoluments—and reliance was placed on the decision in the case of *Ravuthu Koundan* v. *Muthu Koundan*(1) a decision under Regulation 6 of 1831—as showing that when there is a denial that the subject matter of the suit is emoluments, the Civil Court has jurisdiction to determine the question.

That was not a claim to recover emoluments, and so is clearly distinguishable from the present case. The present suit is a claim for emoluments, and as such *primâ facie* within the jurisdiction of the Collector, and in my opinion it is for the Collector to determine in such a suit whether what is claimed is emolument or not.

To refer again to the proviso to section 21, if the Legislature had intended to give the Civil Court jurisdiction in a case like that before us, what could be easier than to declare that intention in that proviso by enacting that recourse may be had to the Civil Courts in cases in which the defendant alleges that what is sued for is not the emolument, as well as in cases in which he alleges that no emolument appertains to the office.

The suit is *primâ facie* within the provision of section 21, and is not within the exception. I see nothing in reason or authority which should take it out of those provisions.

I would therefore allow the appeal.

If the effect of this be that the plaintiff loses his land, that is due to the fact that the Board of Revenue has, as was pointed out by Moore, J., mistaken the position, and instead of giving a decree for the land which it might have given, has given a decree for the assessment only.

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(1) I.L.R., 13 Mad., 41.

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In the circumstances of this case I would direct that each party pay his own costs throughout.

BENSON, J.—I concur in the conclusions arrived at by my learned brothers.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

1904. November 29.

EMPEROR

v.

KANDASAMI GOUNDAN AND ANOTHER.*

Criminal Procedure Code—Act V of 1898, ss. 307, 310—Accused cannot be asked to plead to prior convictions when case referred to High Court under s. 307, before the High Court convicts on such reference.

Sections 307 and 310 of the Code of Criminal Procedure clearly provide that an accused is not to be asked to plead to prior convictions until he has been convicted on the charge under trial.

Where a Court of Sessions makes a reference to the High Court under section 307 of the Code of Criminal Procedure, there is no conviction or acquittal in the Sessions Court and it is only after conviction by the High Court that the accused can be asked to plead to prior convictions.

THE accused in this case was tried before the Sessions Court at Salem for an offence under section 379 of the Indian Penal Code. The jury returned an unanimous verdict of not guilty.

The Sessions Judge passed the following order referring the case under section 307 of the Code of Criminal Procedure to the High Court.

ORDER.—The jury return an unanimous verdict that the accused is not guilty. I am surprised at the verdict. The Foreman says that no one saw when the accused stole. This, of course, is quite an inadequate reason. The act was committed in broad daylight. The things were missed instantaneously. The man was running and more than one person saw him running. While he was running he was caught and when he was caught the properties were found on him. It is impossible to see what link in the chain of evidence is wanting. The verdict is quite unreasonable and I cannot but submit the case for the orders of

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* Criminal Reference No. 15 of 1904, under section 307 of the Code of Criminal Procedure, by M.R.Ry. S. Gopalachariar, Sessions Judge of Salem Division, in Case No. 69 of the Calendar for 1904.

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the High Court. The accused pleads guilty to five previous convictions as entered below. Till the result of the reference is known the accused to be on remand.

The Public Prosecutor in support of the reference.

JUDGMENT.—The evidence of the witnesses for the prosecution makes it quite clear that the accused Kandasami *alias* Ramasami Goundan, was caught in the act of running away after stealing two pairs of new cloths from the first witness, a stall holder at the Mohanur fair on the 28th July last. The accused's plea that he was drunk is not substantiated, nor would it avail even if true, as he says that he voluntarily made himself drunk.

We have no hesitation in convicting him of the theft charged.

The Sessions Judge in reporting the case for orders under section 307, Criminal Procedure Code, has stated that after the verdict of the jury was taken the prisoner pleaded guilty to five previous convictions for similar offences. We are of opinion that the Sessions Judge had no authority to ask him to plead to these charges. Sections 307 and 310, Criminal Procedure Code, clearly provide that an accused is not to be asked to plead to prior convictions until he has been convicted on the charge under trial. In a case referred under section 307, there is no conviction or acquittal in the Sessions Court. It is the High Court which in such case acquits or convicts and it is not until after conviction by the High Court, that the accused can be asked to plead to the prior convictions.

It is therefore necessary for us to now ask the Sessions Judge to take the plea of the accused on the prior charges. If the accused does not admit the prior convictions we direct the Sessions Judge under section 428 of the Criminal Procedure Code to record evidence as to the previous convictions. He will certify to us the plea of the accused, and the evidence, if any, recorded by him in regard thereto, as soon as conveniently may be, and we shall then proceed to pass judgment on the accused.

The procedure we are obliged to adopt is, no doubt, cumbrous. The provisions of section 310, in our opinion, require to be amended so as to allow the Sessions Judge in a case under section 307, after the jury has given its verdict to record the plea of the accused in regard to prior convictions charged against him, and if necessary to take evidence in regard thereto, before reporting the case for the orders of the High Court.

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APPELLATE CRIMINAL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

1906.
August 1.

VALIA AMBU PODUVAL AND OTHERS

v.

EMPEROR.*

Criminal Procedure Code—Act V of 1898, *ss.* 408, 435—*Jurisdiction—Appeal from First-class Magistrate lies to the Sessions Court, within whose jurisdiction the Court of the Magistrate ordinarily sits—'Situate' meaning of.*

The Court of Sessions to which appeals lie from Magistrates of the First Class under section 408 of the Code of Criminal Procedure in the Court of Sessions within the local limits of whose jurisdiction the Court of such Magistrate ordinarily sits, whether the offence be committed within such local limits or not.

The word 'situate' in section 435 of the Code of Criminal Procedure refers to the place where the inferior Courts mentioned therein ordinarily sit.

The principle laid down in section 435 in regard to revisional powers, must, in the absence of any indication to the contrary in the Code, be followed in the case of appeals under section 408.

THE petitioners were tried and convicted by the Assistant First-class Magistrate of Malabar of offences under sections 143 and 147 of the Indian Penal Code, committed within the local limits of the jurisdiction of the Sessions Court of North Malabar. The Assistant First-class Magistrate had his head-quarters at Calicut, situate in the local limits of the South Malabar Sessions Court, but he had criminal jurisdiction over the whole district, comprising the two sessions divisions of North and South Malabar. The petitioners appealed to the Court of Sessions, North Malabar, which rejected the appeals on the ground that the Sessions Court within whose jurisdiction the Magistrate had his head-quarters was the proper appellate authority. The petitioners then appealed to the Sessions Court of South Malabar, but that Court held that no appeal lay to it as the offence was committed in North Malabar and the Magistrate must be considered to have decided the case as a First-class Magistrate of North Malabar.

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* Criminal Revision Cases Nos. 187 to 190 of 1906, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the orders of the Sessions Court of South Malabar in Criminal Appeal No. 14 of 1906 and of the Sessions Court of North Malabar in Criminal Appeal No. 4 of 1906.

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VALIA AMBU PODUVAL v. EMPEROR.

Against the orders rejecting the appeals the petitioners presented revision petitions under sections 435 and 439 of the Code of Criminal Procedure.

The Hon. Mr. *P. S. Sivaswami Ayyar* for *T. Rangachariar* and *K. Kuppuswami Ayyar* for petitioners.

J. L. Rosario for the Acting Public Prosecutor in opposing the applications.

ORDER.—The difficulty in this case arises from the fact that there are two sessions divisions in the same district. This state of things cannot be treated as unwarranted by the law, for the same was the case when the Code of Criminal Procedure was passed, and paragraph 3 of section 7 of it recognizes the legality of the then existing sessions divisions and districts unless and until altered.

The Magistrate, against whose decision the appeal is to be preferred, has his head-quarters in Calicut which is within the local limits of the South Malabar sessions division, though he is authorised to try offences throughout the whole district, including cases arising within the sessions division of North Malabar. It must, we think, be held that appeals against his decisions lie to the Sessions Judge of South Malabar, irrespective of the place where the offence was committed.

Section 408, Criminal Procedure Code, referring to appeals from First-class Magistrates, merely states that the appeal lies "to the Court of Sessions" without any further explanatory words.

Section 435, however, which deals with the powers of revision of Sessions Courts, enacts that the Sessions Judge may call for and examine the records of any inferior Criminal Court "situate" within the local limits of his jurisdiction. The word "situate" means fixed or located; when applied to a Court it must be taken to refer to the place where the Court ordinarily sits. In the absence of any indication to the contrary in the Criminal Procedure Code, the principle thus laid down in regard to the analogous powers of revision under section 435, should be followed in the case of appeals also. We hold therefore that the appeals should have been received by the Sessions Court of South Malabar, and direct that they be now received by that Court and dealt with according to law.

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PRIVY COUNCIL.

P.C.*
1906.
November 15.
1907.
February 8.

PRAYAG DOSS JI VARU (DEFENDANT),

v.

TIRUMALA SRIRANGACHARLA VARU AND ANOTHER (PLAINTIFFS).

[On appeal from the High Court of Judicature at Madras.]

Hindu Endowment—Scheme for management of Hindu temple by Mahant—Pow to make and modify such a cheme—Power to alter trust of endowment—Ci Procedure Code (Act XIV of 1882), s., 539— Provision for application of surp funds.

This was a suit in which the respondent charged the appellant, the manager a certain Hindu temple, with neglect to keep proper accounts, misappropriati of offerings and other acts of a similar character, and the relief prayed was settling of a scheme for the management of the temple including "provisio for the application of the surplus funds belonging to the temple with su modifications of the managing authority" as might be necessary to obviate t evils referred to, " and place the administration of the temple on a satisfacto footing." Objections were taken to the scheme settled by the High Court (whi amended one framed by the District Court) that its effect would be to lower t position of the Mahant and weaken his authority, and that it provided for t application of surplus funds by devoting them to objects foreign to the purpo of the endowment. The Judicial Committee settled a scheme calculated to g rid of those objections and to meet the exigencies of the case without impairi the authority of the Mahant whose position, subject to the scheme, was to be t same as before, and providing that all surplus income should be invested for t benefit of the temple, with liberty to the Mahant or any person interested apply to the District Court with reference to the carrying out the directions the scheme, or to the High Court for any modification of it which might appe to be necessary or convenient.

APPEAL from a decree (February 10th, 1905), of the High Cou at Madras, which varied a decree (November 7th, 1901), of t Court of the District Judge of North Arcot.

The litigation out of which the present appeal arose w concerned with a large number of devastanams or Hindu templ situate at Tirupati in the Carnatic, which had been, since 184

* *Present:*—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE, a Sir ARTHUR WILSON.

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under the management of successive Mahants, each of whom the plaintiffs (the present respondents, two subordinate officials attached to the temples) alleged had been guilty of malversation and misappropriation of the trust funds. The present suit was brought with the consent of the Advocate-General of Madras under section 539, Civil Procedure Code, against Ramakissore Doss (the present appellant) whom the plaintiffs charged with improper use of his powers, with failure to perform regular religious ceremonials, with neglect to keep proper accounts, with misappropriation of offerings, and with other acts of a similar character. The relief prayed for in the plaint as eventually amended was "settling a scheme for the management of the plaint devastanams, inclusive of provisions for the application of the surplus funds belonging to the devastanams, with such modifications in the organization of the managing authorities as may be necessary to obviate the evils referred to above, and to place the administration of the devastanams on a satisfactory footing."

The defendant denied the charges made against him and pleaded that the suit was not maintainable under section 539 of the Civil Procedure Code; and that under the said section the Court had no power to alter the constitution of the trust when framing a scheme of management.

The District Judge framed a scheme which, on appeal by both parties, was varied by the High Court (SUBRAHMANIA AYYAR and DAVIES, JJ.). The history of the temples and further facts and proceedings concerning them previous to suit are fully stated in the judgment of the High Court (*Prayag Doss Ji Varu* v. *Tirumala Srirangacharla Varu*(1)).

On this appeal which was heard *ex parte Sir R. Finlay, K.C., and L. DeGruyther* (with them *W. R. Le Fanu*) for the appellant contended that the power of the Civil Courts in India to appoint persons to control the trustees of religious institutions was limited to cases under section 3 of Act XX of 1863, but that section had no application to the trust in suit. Even if the High Court had power (which it was submitted it had not) under section 539 of the Civil Procedure Code to alter the constitution of the trust by the appointment of an additional paid trustee, or by providing for the summary removal of a trustee which was opposed to the

(1) I.L.R., 28 Mad., 319.

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PRAYAG DOSS JI VARU v. TIRUMALA SRIRANGA-CHARLA VARU.

provisions of sections 14 and 18 of Act XX of 1863, such alterations were objectionable, their effect being to impair the prestige and dignity, and therefore destroy the authority, of the appellant as Mahant, which was derived from the Government Sanad given to Seva Doss and his successors in office by the Collector on 10th July 1843, and so the trust would suffer. It was also submitted that, as the plaint was allowed to be amended, and the portion of the prayer relating to the application of any surplus funds inserted, after the suit had been heard on appeal and shortly before the judgment of the High Court was delivered, there were no materials on which the High Court could properly find that there were surplus funds which could not be applied to the legitimate objects of the trust. Even if a proper case had arisen for the application of any surplus funds the objects on which they were to be expended under the scheme of the High Court were not consistent with the purely religious objects for which the trust in suit was founded.

1907, *February 3rd*.—The judgment of their Lordships was delivered by

Lord MACNAGHTEN.—The suit which has given rise to this appeal was brought for the purpose of having a scheme settled for the management of a Hindu Devastanam, or temple, situated in Tirupati, and the protection of its funds.

It was not disputed in either of the Courts below that a scheme was necessary. The questions in debate were confined to matters of detail.

The state of things which made a scheme necessary and the earlier history of the Institution are summed up in the following passage taken from the judgment of the High Court:—

"The temple of Sri Venkateswara in Tirumalai or Tirupati in the North Arcot district is a very ancient Hindu temple to which worshippers resort from all parts of India, and is in receipt of an annual income of between two and three lakhs of rupees. Prior to the establishment of the British Government, the management of the institution was directly under the ruler of the country for the time being. After the advent of the British, the management passed into the hands of the East India Company, and subsequent to the enactment of Regulation VII of 1817 of the Madras Code, it was carried on under the control of the Board of Revenue through the Collector of the District. With reference to a despatch of the year 1841 from the Court of Directors ordering the immediate withdrawal from all interference on the part of the officers

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of Government with native temples and places of religious resort, the management of the temple was in 1843 made over to Seva Doss, the head of a Mutt called Hathiramji Mutt, situated in the town of Tirupati at the base of the hill on which the important shrine stands. In the 'sannad' by which this transfer of management was effected, it was provided that Seva Doss' successors in the Mutt should be his successors as Vicharanakartha or Manager of the temple. Seva Doss having died in 1864, Darma Doss succeeded him, and on Daarma Doss' death in 1880, Bagavan Doss became Manager and continued so till 1890. From 1890 to 1894 Mahbir Doss was Manager. And from 1895 to 1900 Ramakisore Doss, the defendant in the two suits Nos. 31 of 1898 and 10 of 1899 on the file of the North Arcot District Court, held the management; and on his death, pending the litigation, the present Mahant, as the head of the Mutt is styled, succeeded to the office of the Manager, and was brought on the record as the legal representatative of Ramakisore."

"Now, when in 1843 the management was transferred to Seva Doss, it was, no doubt, expected that the management by the Mahant would prove satisfactory, but the history of what took place subsequent to Seva Doss' death is, to put it shortly, a record of waste and embezzlement."

In these circumstances the District Court settled a scheme. The scheme was amended by the High Court on appeal. As amended it was still not satisfactory to the parties most concerned, and the Mahant appealed to His Majesty in Council. The principal objections urged on the appeal were (1) that the effect of the scheme would be to lower the position of the Mahant, and weaken his authority, and (2) that, although there was no surplus in hand nor any immediate prospect of a surplus, the scheme provided for the application of surplus revenue, devoting it to objects admirable, perhaps in themselves, but somewhat foreign to the purposes of the Institution. It was pointed out that these provisions were unnecessary at present and likely to prove embarrassing in the future.

The appeal to this Board was heard *ex parte*. But their Lordships had the benefit of Sir Robert Finlay's official experience in similar matters in this country. After a full discussion in Court their Lordships, with the assistance of the learned Counsel engaged, have settled the following scheme which will, they think, meet the exigencies of the case without impairing the authority of the Mahant as the duly constituted manager of the Institution.

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Scheme.

1. A treasurer to be appointed by the District Court at salary.

2. All funds to be in the custody of the treasurer. Rules to b framed by the District Court to ensure the proper receipt an custody of all offerings, income, and funds, and investment of an surplus, and to prevent misappropriation, and to ensure the prop management of any estates or other properties or investments.

3. The Vicharanakartha, two months prior to the commence-ment of every year, to prepare and file in the District Court budget of the expenses to be incurred in the ensuing year.

4. The treasurer to put the Vicharanakartha in funds for a disbursements according to the budget, and for any further ex-penditure deemed necessary by the Vicharanakartha, but, unless b leave of the District Court, such further expenditure not to excee Rs. 5,000 during any one year.

5. The Vicharanakartha, within three months after the end o each year, to cause to be prepared and filed in the District Cour a detailed account of receipts and disbursements of the yea The accounts to be audited by an auditor to be appointed by th District Court. The remuneration of the auditor to be fixed b the District Court and paid from the Devastanam funds. A abstract of the said accounts prepared and certified by the audito to be published in such manner as the District Court shall direct

6. All surplus income to be invested for the benefit of th temple.

7. No immoveable property of the temple, including lands hel on mortgage, lease, or any other right, to be given on lease fo more than five years, mortgaged or sold by the Vicharanakartha except with the sanction of the District Court.

8. No jewels or other property of value to be sold without th sanction of the District Court.

9. Subject to this scheme the Vicharanakartha's position t remain as before.

10. Liberty for the Vicharanakartha and any person intereste to apply to the District Court with reference to the carrying ou of the directions of this scheme.

11. Liberty for the Vicharanakartha and any person intereste from time to time to apply to the High Court for any modificatio of this scheme that may appear to be necessary or convenient.

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Their Lordships will, therefore, humbly advise His Majesty that an Order be made to the following effect:—

PRAYAG DOSS JI VARU v. TIRUMALA SRIRANGACHARLA VARU.

Discharge the Orders of the High Court and the District Court;

Approve the foregoing scheme as a proper scheme for the management of the Devastanam;

Refer it to the District Court to appoint a treasurer to frame such rules as are required under the said scheme to be framed by them (with power to vary the same from time to time), and also to fix the date when the scheme is to come into operation.

The costs of all parties of this suit, including the charges and expenses of the Vicharanakartha properly incurred, the costs of the appeal to the High Court, and the costs of the appeal to His Majesty in Council, to be submitted to the District Court and as approved by the Court to be paid and retained out of the funds of the Devastanam.

Solicitors for the appellant—*Lawford, Waterhouse & Lawford.*

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

1906. September 4.

MARUTHAMUTHU PILLAI AND OTHERS (DEFENDANTS NOS. 2 TO 7), APPELLANTS,

v.

KRISHNAMACHARIAR AND OTHERS (PLAINTIFFS AND FIRST DEFENDANT), RESPONDENTS.*

Letters Patent, cl. 15—'*Judgment*'—*Order shutting out evidence is a judgment and appealable as such.*

An order refusing to issue a commission for the examination of witnesses, whose personal attendance cannot be enforced, affects the right to produce evidence relevant to the issues in the suit and is a judgment within the meaning of clause 15 of the Letters Patent and appealable as such.

That the Judge has a discretionary power does not affect the appealability of the order.

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* Original Side Appeal No. 17 of 1906 presented against the judgment of Mr. Justice Boddam in Original Suit No. 171 of 1905.

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MARUTHAMUTHU PILLAI v. KRISHNAMACHARIAR.

The facts necessary for this report are set out in the judgment.

S. Subrahmania Ayyar for appellants.

Mr. *A. Read* for first to third respondents.

JUDGMENT.—The appeal is on the footing that the learned Judge's order precludes the appellants from adducing any evidence to be given by the witnesses mentioned in the affidavit with reference to the issues raised in the case as to their liability in regard to the claim of the plaintiffs wholly or in part: those witnesses being residents outside the jurisdiction of the Court and at a distance, from the Court, of more than 200 miles, and so not compellable to attend in person. We must overrule the preliminary objection raised by Mr. Read that no appeal lies. The effect of the order is, we think, that stated by the appellants, and the order therefore is one which affects their right to produce evidence relevant to the issues in the suit: in short, if the order stands, all the evidence of their witnesses will be effectually shut out. We think, therefore, the order is a judgment within the meaning of section 15 of the Letters Patent.

Our attention has been drawn to a number of cases, but we think it unnecessary to notice them, as the question must depend upon the effect of the order to which the appeal relates. It is sufficient to say that the fact that the Judge has to exercise his discretion in regard to the issue of a commission does not affect the appealability of the order, though it will be a matter for consideration in dealing with the merits of the order appealed against. Turning to the facts of the case, the substantial contest between the parties is on the question whether the supply of goods after the date of the agreement of the 8th February 1905 relied on by the defendants was to the first defendant in his individual capacity, or as a partner of the appellants. There are also other subsidiary questions for decision. The evidence which, as is stated in the affidavit, the witnesses are in a position to give is on its face material, and the circumstances that one is a party to the suit and that others are relations of the parties cannot affect the right to have the witnesses examined on commission.

If the evidence is to be adduced at all by the appellants, it can be only by taking out a commission, having regard to the distance at which the witnesses reside from the Court.

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We therefore set aside the order appealed against, and direct the issue of commissions on such special terms, if any, as the Court may, in the circumstances, think fit to prescribe. MARUTHAMUTHU PILLAI v. KRISHNAMACHARIAR.

The costs of the application and appeal will be costs in the cause.

Messrs. *Short & Bewes*, attorneys, for first to third respondents.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1906. October 10, 11, 23.

SRIRAMULU NAIDU AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

ANDALAMMAL AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Prescription—Adverse possession—Possession by guardian prima facie *not adverse to the ward—Hindu Law—Reversioner, acceleration of succession of—No acceleration where gift to presumptive reversioner subject to obligations—Insolvent, undischarged, may sue for after acquired property movable or immovable if the Official Assignee does not intervene.*

It is well established that possession is never to be considered adverse if it can be referred to any lawful authority.

Possession of the ward's property by a guardian will be presumed to be on behalf of the ward and will not in the absence of evidence to the contrary be held to be adverse to the ward.

A gift by a Hindu widow of property in which she has a widow's estate to the presumptive reversioner has not the effect of accelerating the succession of such reversioner, if the transfer imposes on the reversioner obligations which would not have existed if the property had devolved on him by inheritance.

An undischarged insolvent has, in respect of after acquired property, movable and immovable, a right against all the world except the Official Assignee and may sue to recover such property if the Official Assignee does not intervene.

PLAINTIFFS as the reversioners of Ethirajulu Naidu sued for possession of properties, of which Ethirajulu Naidu was the last male holder. The first plaintiff was an undischarged insolvent.

The properties originally belonged to one Bhashyakarlu Naidu, the father of Ethirajulu. Bhashyakarlu Naidu died in the year

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* Original Side Appeal No. 67 of 1905, presented against the judgment and decree of Mr. Justice Boddam in Original Suit No. 187 of 1904.

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SRIRAMULU NAIDU v. ANDALAMMAL.

1853, leaving a widow E and Ethirajulu his minor son. He also left a will by which he appointed P and two others executors. P, alone, took out probate and sold the plaint properties in 1853 for discharging debts due by the testator. The purchaser never took possession, E continuing in possession throughout till 1900. Ethirajulu Naidu died in 1868. In 1900 E made a gift of the properties to the husband of the first defendant, who was then the presumptive reversioner of Ethirajulu Naidu. The donee died in 1903 and E died in 1900.

The plaintiffs' case was that the properties became vested in Ethirajulu Naidu on the death of Bhashyakarlu Naidu ; that on Ethirajulu's death in 1868, E succeeded as his mother ; and that on E's death they became entitled as the next reversioners. The first defendant's contention, was, shortly, that E after the sale by P in 1853, held the property adversely to the purchaser and acquired a title thereto by prescription before the death of Ethirajulu and that the property did not devolve on her as the heir of Ethirajulu; that even if it did, the gift to the first defendant's husband in 1900 accelerated the succession and the property passed as if E had died at the date of the gift; and lastly, that the first plaintiff as an undischarged insolvent had no right of suit.

The suit was tried by Boddam, J., on the Original Side and dismissed with costs.

Plaintiffs preferred this appeal.

V. Krishnaswami Ayyar, The Hon. Mr. *L. A. Govindaraghava Ayyar* and *C. P. Ramaswami Ayyar* for appellants.

P. R. Sundara Ayyar, *S. Gopalaswami Ayyangar* and *C. Venkatasubbaramiah* for first respondent.

JUDGMENT.—The three principal questions which arise for determination in this case are first, whether Ethirajamma the widow of Bhashyakarlu Naidu and mother of Ethirajulu Naidu acquired by prescription an absolute interest in the two houses, No. 58, Narayana Mudali Street, and No. 10, Chinnatambi Mudali Street, Madras, which are the subject of the present suit; secondly, if not, whether, by the deed of gift, exhibit B, bearing date 18th January 1900, of the said properties to Raghavalu Naidu, the late husband of the first defendant and who predeceased Ethirajamma, his succession to the properties as the nearest reversioner at the time of Ethirajulu was accelerated, and thirdly

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if there was no such acceleration of succession, whether the fact that the first plaintiff is an undischarged insolvent precludes his recovering the share to which he would be entitled as one of the three heirs (bandhus) of Ethirajulu when the succession opened on the death of Ethirajamma.

Now as to the first question the facts relevant are shortly these: Bhashyakarlu Naidu, above referred to, died in the year 1853, leaving his widow Ethirajamma and an only son Ethirajulu, the latter being a minor at the time. Bhashyakarlu Naidu left a will whereby he appointed three executors to manage his estate and to hand over the property to his son on his attaining his twentieth year. The testator authorised his executors to sell certain of his properties and discharge the debts he owed. Of these executors, Coovum Venkatasami Naidu alone, obtained probate of the will and sold the houses in question to one Parthasaradhi on 21st April 1854, though the will directed that house No. 58 in Narayana Mudali Street should not be sold, the same being required for the residence of the testator's widow and his son. The vendee, however, never entered into possession. Ethirajamma and Ethirajulu continued to reside in house No. 58, Narayana Mudali Street, down to the death of Ethirajulu which took place in 1868. The other house also was in her possession during the time, the rents thereof being received by her.

The real question is as to the character of the possession thus held by her between 1853 and 1868. In dealing with this question it is unnecessary to consider whether the sale by the executor of house No. 58 was valid or not, since the vendee allowed his right, if any, under the purchase to be lost by lapse of time.

Was then the possession of Ethirajamma adverse to Ethirajulu as contended on behalf of the first defendant? Now it is well established "that possession is never to be considered adverse if it can be referred to any lawful authority." Assuming that the properties in dispute were the separate properties of Bhashyakarlu Naidu, the title thereto vested on his death in his son Ethirajulu. He being a minor at the time under the custody and guardianship of his mother Ethirajamma, her possession must be taken to have been on his behalf. *Thomas* v. *Thomas*(1) and *Wall* v.

(1) 25 L.J. Eq., 159.

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Stanwick(1). There is absolutely no evidence in favour of the defendant's contention that Ethirajamma's possession was otherwise than on behalf of her son. On the contrary Ethirajamma's admission, as well as that of Ragavalu in the plaint in Original Suit No. 62 of 1900, is decidedly against it, for she there stated that she succeeded to these properties as heir to her son, and Ragavalu is referred to as his reversioner entitled to succeed to them on her death, a view of their rights utterly inconsistent with the supposition that she had held possession adversely to her son during his life-time and had acquired an absolute title thereto.

The learned Judge answered the issue relating to the question under consideration in the affirmative. Having regard to the fact that notwithstanding such conclusion, the learned Judge held that exhibit B operated to vest the succession in Raghavalu, as the reversionary heir of Ethirajulu, we are unable to say that the learned Judge intended to go further than to lay down that Ethirajamma's possession was adverse to the vendee under the conveyance by the executor. Be this as it may, having regard to the fact that Ethirajamma was Ethirajulu's guardian at the time when her possession began in 1853, our answer to the question under consideration is in the negative.

Passing to the next point, the terms of the deed of gift have to be considered. Though the interest of Ethirajamma in the houses was transferred to Raghavalu, yet the transfer was not without qualification. Under it, the donee had not only to provide for the maintenance of the transferor, but had also during her life-time to pay annually to one of her dependants Rs. 84 and to maintain a charity for all time at an annual expense of Rs. 50. Further, on her death, he had to make payments on different accounts aggregating Rs. 2,400, that is, about one-fourth of the estimated value of the properties.

Of course, Raghavalu would not have been subject to any of the obligations cast upon him by the deed of gift were the property to devolve on him by inheritance in the usual course. The transaction was thus essentially an onerous gift, and therefore an alienation by her, the validity or invalidity of which was determinable with reference to the rules of Hindu Law, governing transfers by qualified female proprietors. It was certainly not a

(1) 34 Ch.D., 763.

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SRIRAMULU NAIDU v. ANDALAMMAL.

mere withdrawal of Ethirajamma's life-interest so as to accelerate the succession of the then reversionary heir within the meaning of the rule laid down by the Judicial Committee in *Behari Lal* v. *Madho Lal Ahir Gyawal*(1). It follows therefore that exhibit B did not operate to accelerate the succession as contended on behalf of the first defendant.

Lastly, as to the right of the first plaintiff to recover his one-third share in the disputed properties, he having become an insolvent prior to the death of Ethirajamma, the interest which devolved on him, on her death, as one of the bandhus of her son was his after-acquired property which also vested under section VII of 11 and 12 Vict., Chap. 21, in the Official Assignee. No doubt that interest being an interest in immovable property the rule formulated in *Cohen* v. *Mitchell*(2), that "until the trustee "intervenes all transactions by a bankrupt after his bankruptcy "with any person dealing with him *bonâ fide* and for value in "respect of his after-acquired property whether with or without "knowledge of bankruptcy are valid against the trustee" does not extend to such an interest. (*Rowlandson* v. *Champion* (3)). But there is here no question of any *contract* or *transfer* by the insolvent relating to his after-acquired immovable property.

The point is whether he can sue to obtain possession of such property the Official Assignee not having intervened. Upon the authorities to which our attention was called by Mr. V. Krishnaswami Ayyar, it must be held that in the circumstances of the present case, he can. In *Herbert* v. *Sayer*(4) relied on by Mr. Krishnaswami Ayyar, no doubt the subject of the action was not realty, but the discussion and the reasoning of the Court were as to after-acquired property generally, and after an exhaustive review of the statutes and the decisions from the earliest times, the Judges took the principle deducible from them to be that he has a right to such property against all the world except the Assignee. The Court accordingly held that the suit by the bankrupt with reference to the bill of exchange which had been indorsed to him was sustainable as the Assignee had not intervened. At pages 978, 979 in *Herbert* v. *Sayer*(4) this sort of interest of the bankrupt is spoken of as "special property."

(1) 19 I.A., 30.
(2) L.R., 25 Q.B., 262.
(3) I.L.R., 17 Mad., 21.
(4) 5 Q.B., at pp. 978, 979, 965.

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And *In re New Land Development Association and Gray*(1) that Chitty, J., did not intend to deny the existence of such special property in the bankrupt in regard to realty, may be inferred from his observation. "I do not say if the trustee had not intervened, "W. Shurly might not have received the rents of his share of this "property in the meantime" (at page 145) and the observations of the Master of the Rolls, as well as of Lopes, L.J., in *Cook* v. *Whellock*(2) in support of the view that an uncertified bankrupt who sued for rents of property let by him to a tenant after his bankruptcy was not a nominal party with reference to the rule as to requiring security, support the same view. *Fatimabibi* v. *Fatimabibi*(3) is a direct decision in this country on the point.

The Official Assignee not having intervened, the first plaintiff is entitled to sue and recover his share.

The decree of the learned Judge must, therefore, be modified and each plaintiff declared entitled to one-third share of the properties in dispute. We direct that a partition be effected, and the share due to each be delivered over to him, subject to any application which may be made with reference to the provisions of the Partition Act IV of 1893, with mesne profits to be ascertained in execution from the date of the death of Ethirajamma to the date of possession or three years from this date whichever is earlier. Each plaintiff will be entitled to recover from the first defendant a moiety of the costs before the learned Judge and in this appeal. Notice of the decree in this suit is so far as it is in favour of the first plaintiff will be given to the Official Assignee.

(1) L.R., [1892], 2 Ch., 138. (2) L.R., 24 Q.B.D., 662.
(3) I.L.R., 16 Bom., 452.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

SUB-COLLECTOR OF GÓDÁVARI (DEFENDANT), APPELLANT, 1906. September 6, 17.

v.

SERAGAM SUBBAROYADU AND OTHERS (CLAIMANTS), RESPONDENTS.*

Land Acquisition Act I of 1894, *ss.* 3 (*a*), 23 (2)—*When land is acquired with trees on it, the* 15 *per cent. ought to be calculated on the value of both.*

Trees are 'things attached to the earth' and are thus included in the definition of land in section 3 (*a*) of the Land Acquisition Act; and this definition must be applied in the construction of section 23 of the Act.

The value of such trees as are on the land when the declaration is made under section 6 is included in the market value of the land on which the allowance of 15 per cent. is to be calculated under section 23 (2) of the Land Acquisition Act.

FIFTY cents of land belonging to the claimants were acquired by the Government under the provisions of the Land Acquisition Act. The lands were planted with cocoanut trees. The Collector awarded Rs. 600 per acre which the claimants refused to accept. A reference was made to the District Court which awarded compensation for the land at Rs. 100 per acre and for the trees at Rs. 600 per acre with the 15 per cent. allowance on the aggregate value.

The Sub-Collector preferred this appeal.

The Government Pleader for appellant.

V. Ramesam for respondent.

JUDGMENT.—The appeal arises out of a reference made to the District Court of Gódávari under section 18 of the Land Acquisition Act I of 1894. The greater part of the land acquired was grown with cocoanut trees and the District Judge has assessed the compensation separately on the trees, and on the land excluding the trees, and to the aggregate so calculated has added 15 per cent of the whole as the allowance prescribed by section 23 (2) of the Act.

* Appeal No. 4 of 1905, presented against the award of F. H. Hamnett, Esq., District Judge of Gódávari, in Original Petition No. 303 of 1904.

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SUB-COLLECTOR OF GÓDÁVARI v. SERAGAM SUBBA-ROYADU.

The Government has appealed on the single ground that the allowance of 15 per cent. ought to have been calculated on the value of the land alone and not on the value of the trees.

We are unable to take this view. We think that, though the District Judge has separately assessed the compensation for the land and for the trees, respectively, it was not necessary for him to have done so, and that the value of the trees is properly a part of the market value of the land.

The word 'land' as defined in section 3 (*a*) includes 'things attached to the earth,' and therefore trees, and this definition has to be applied to section 23, unless there is something repugnant in the subject or context.

The Government Pleader contends that the second clause of sub-section 1 of section 23, shows that in this section the trees standing upon land cannot be regarded as a part thereof, but we do not think that that is the effect of the clause. That clause refers to damage sustained by reason of the taking of standing crops or trees which may be on the land at the time of the Collector's taking possession thereof, and cannot, without a misuse of language, be applied to a case of purchase of land with trees upon it. In such a case if the price is fair no damage is sustained by either party.

We think the clause may be applied to the case provided for in section 17 when the Collector takes possession before award, and the owner of the land declines to accept the sum then offered as payment for the crops or trees taken, or possibly, as suggested for the respondent, to the case of crops or trees grown after the date of the declaration under section 6, the date with reference to which the market value has to be estimated.

It may be, as the Government Pleader suggests, that the Collector is not, in making an offer under section 17 (3), bound to allow 15 per cent. over the value of the trees to be paid for, but the offer made under that section is one which the owner of the land can accept or reject, and he may prefer to take a sum down rather than to wait for the award.

Moreover, to read the first clause of section 23 (1) as referring to the bare land without the trees, involves this difficulty: there is no provision in the Act for the separate assessment of compensation for buildings apart from the land on which they stand, and, inasmuch as it is impossible to hold that they are liable to be acquired

without payment of compensation, it must be taken, that in section 23, the word "land" includes "buildings standing thereon." If so, that must be, because buildings are 'things attached to the earth': but so are trees 'things attached to the earth,' and it is anomalous to interpret the same word as including one class of things attached to the earth and excluding another.

We avoid this difficulty by including the trees as part of the land, and we can, at the same time, give due effect to the second clause of sub-section (1), by applying that clause to the special cases to which we have already referred.

In the present case the trees were on the land when the declaration under section 6 was published and their value is therefore included in the market value of the land, on which the allowance of 15 per cent. is to be calculated under section 23 (2).

The appeal, therefore, fails, and we dismiss it with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

SUBRAYA MUDALI (DEFENDANT), APPELLANT,

v.

VELAYUDA CHETTY (PLAINTIFF), RESPONDENT.*

1906. September 21, 25.

Pensions Act XXIII of 1871, *ss.* 3, 11, 12 —*Section* 12 *applies only to Pensions as stated in section* 11 *and does not extend to grant of land revenue as defined in section* 3.

Section 12 of the Pensions Act prohibits only the assignment of any money payable on account of any such pension, pay or allowance as is mentioned in section 11; and the pensions referred to in section 11 are periodical allowances made by Government on political considerations, or on account of past services, or present infirmities or as a compassionate allowance.

Payments of money for purposes other than those stated may be 'grants of money or land revenue' within the meaning of section 3, but the provisions of section 12 will not apply to them.

The Secretary of State for India v. *Khemchand Jeychand,* (I.L.R., 4 Bom., 432), followed.

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* Second Appeal No. 397 of 1905, presented against the decree of R. D. Broadfoot, Esq., District Judge of Chinglepnt, in Appeal Suit No. 369 of 1904, presented against the decision of M.R.Ry. P. Sivarama Ayyar, Deputy Collector of Tiruvallur Division, in Summary Suit No. 359 of 1904.

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SUBBAYA MUDALI v. VELAYUDA CHETTY.

SUIT by plaintiff as lessee of the shrotriem village of Pulliyur to enforce acceptance of patta by the defendant.

The Court of first instance passed a decree in favour of the plaintiff. The defendant appealed and raised the contention in the District Court that the suit was unsustainable as the lease to the plaintiff by the shrotriemdar was void under section 12 of the Pensions Act. This contention was rejected and the decree confirmed.

Defendant appealed.

T. V. Seshagiri Ayyar for appellant.

The Hon. Mr. *L. A. Govindaraghava Ayyar* for respondent.

JUDGMENT.—In this case a tenant in a shrotriem village objects to the tender of a patta by the lessee of the shrotriemdar on the ground that the lessee has no right to tender a patta as the lease in his favour is an assignment prohibited by section 12 of the Pensions Act, this being an unenfranchised inam. Assuming that the inam in question is a grant of land revenue within the meaning of the Act, we do not think section 12 applies to it. That section applies to assignments in respect of money payable on account of any such pension, pay or allowance as is mentioned in section 11. Section 11 provides that, no pension granted or continued by Government on political considerations, or on account of past services or present infirmities or as a compassionate allowance shall be liable to attachment. Consequently the question is, " Is the grant now under consideration a pension within the meaning of section 11 ? " The words " pension or grant of money or land revenue " are used in the preamble and in sections 4, 5, 8, 10 and 14 (8) of the Act, while sections 11, 12, 13 and 14 (1) to (7) mention pensions only. In section 3 the expression " grant of money or land revenue " is defined as including " anything payable on the part of Government in respect of any right, privilege, perquisite or office," but pension is not defined in the Act. Although the construction of the Act is not free from difficulty, we agree with the conclusion arrived at in *The Secretary of State for India in Council* v. *Khemchand Jeychand*(1) where it was held the pensions referred to in section 11 are periodical allowances granted, as there stated, by Government " on political considerations or on account of past services

(1) I.L.R., 4 Bom., 432.

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or present infirmities, or as a compassionate allowance" as distinguished from payments by Government "in respect of any right, privilege, perquisite or office" which fall within the definition of "grant of money or land revenue" in section 3. That decision has been approved and followed by this Court in *Khasim* v. *Carlier*(1) and also in *Lachmi Narain* v. *Makund Singh*(2) and *Jiban Krishna Ghosh* v. *Sripati Charan Dey*(3). The present grant which is stated in the Inam Register to have been made by way of compensation for loss sustained on the abolition of the Nattavar office, hereditary in the grantee's family, is clearly a grant falling within section 3, and not within sections 11 and 12 and the Lower Courts were therefore right in overruling the defendant's plea.

SUBBAYA MUDALI v. VELAYUDA CHETTY.

The appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Wallis.

BODDA GODDEPPA (DEFENDANT), APPELLANT,

v.

THE MAHARAJA OF VIZIANAGARAM (PLAINTIFF), RESPONDENT.*

1906. September 24. October 15.

Landlord and tenant—Occupancy right, nature of—Ryot with occupancy right has no right to cut fruit trees.

Ryots with rights of occupancy possess in their lands a heritable and alienable interest of a permanent character, but not the sole interest. The landlord is interested in maintaining the saleability of the holding, and, in protecting such interest, he is entitled to restrain the ryot from cutting fruit-bearing trees.

Rangayya Appa Row v. *Kadiyala Rathnam*, (I.L.R., 13 Mad., 249), followed.

SUIT under section 10 of the Rent Recovery Act for compelling acceptance of puttah and the execution of a muchilika. The defendant, the tenant objected to the provision in the puttah that the tenant should not cut trees in his holding.

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(1) I.L.R., 5 Mad., 272. (2) I.L.R., 26 All., 617.
(3) 8 Calc., W. N., 665.

* Second Appeal No. 676 of 1905, presented against the decree of W. B. Ayling, Esq., District Judge of Ganjam in Appeal Suit No. 1503 of 04, presented against the decision of C. B. Cotterel, Esq., Head Assistant Collector of Berhampore, in Summary Suit No. 2078 of 1903.

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BODDA GODDEPPA v. THE MAHARAJA OF VIZIANAGARAM.

The Sub-Collector thought the restriction too wide and confined it to fruit trees.

This decision was confirmed on appeal by the District Court.

Defendant preferred this second appeal.

V. Krishnaswami Ayyar for appellant.

T. Ranga Chariar for respondent.

JUDGMENT.—In this case the plaintiff, a Zamindar, sued under section 10 of the Rent Recovery Act to enforce acceptance of a puttah. The tenant objected on the ground, among others, that the puttah restricted the tenant from cutting trees on his holding without the Zamindar's permission. The Head Assistant Collector thought the restriction too wide, and limited it to fruit-bearing trees and the District Judge upheld his decision. The defendant now appeals. Both the lower Courts relied on the decision in the case of *Rangayya Appa Row* v. *Kadiyala Rathnam*(1). It was held in that case by Muthusami Iyer and Parker, JJ., that, *primâ facie*, a tenant would not be at liberty to cut down fruit trees on his holding as he, by so doing, would considerably impair the value of the property, and the fact that a restriction on cutting down trees had been inserted in the puttah for a number of years was held to show that the usage in the particular case was in accordance with the usual rights of a landlord. That the tenants in this case had permanent rights of occupancy in the lands included in their puttah appears from what is stated in the judgment with reference to an unsuccessful claim which they made to have certain other lands included in their puttahs. These lands they claimed to hold not on lease for three years, but in perpetuity and on the same terms as they held ordinary jeroyati lands. The Court rejected the claim to include the additional lands in the puttahs which were thus confined to the ordinary jeroyati lands in which the tenants held permanent rights of occupancy. In the case of *Narayana Ayengar* v. *Orr* (2), however, the Judges assumed that the lands included in the puttahs in that case were held on a three years' lease. The decisions in *Rangayya Appa Row* v. *Kadiyala Rathnam*(1) was followed in *Apparau* v. *Narasanna*(3) and *Bhupathi* v. *Rangayya Appa Rau*(4), but we are now asked to disregard the authority of these cases on the

(1) I.L.R., 13 Mad., 249.
(2) I.L.R., 26 Mad., 252.
(3) I.L.R., 15 Mad., 47.
(4) I.L.R., 17 Mad., 54.

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BODDA GODDEPPA v. THE MAHARAJA OF VIZIANAGARAM.

ground that they proceed on a view of the nature of the tenant's interest in holding, which has been departed from in the well-known cases of *Venkatanarasimha Naidu* v. *Dandamudi Kotayya*(1) and *Cheekati Zamindar* v. *Ranasooru Dhora*(2). We think however, that Muthusami Ayer, J., cannot be taken to have been ignorant of the true nature of occupancy right as explained in these cases as it is fully recognised in his judgments in *Srinivasa Chetti* v. *Nanjunda Chetti*(3) and *Apparau* v. *Subbanna*(4), on the authority of which the decision in *Venkatanarasimha Naidu* v. *Dandamudi Kotayya*(1), proceeded. According to these cases, the occupancy tenants, to borrow the language of Subrahmania Aiyar, J., in *Venkayya* v. *Ramasami*(5), "possess in their lands a heritable and alienable interest of a permanent character." They have not, however, the sole interest. Where the old varam system still prevails, the landlord has a right to share in the produce, and even where it has been commuted for a money payment, he is still interested in maintaining the saleable value of his holding which is security for his rent, and by reason of his rights as reversioner in case the tenant should relinquish or forfeit it. It is for the protection of these interests that tenants have been restrained from altering the character of their lands as by erecting on them buildings of a non-agricultural nature or otherwise injuring them. Trees have been held by the Privy Council in *Ruttonji Edulji Shet* v. *The Collector of Tanna*(6), to form part of the land, and trees bearing fruit crops certainly bear a greater analogy to land than to crops. In the present case we are only concerned with a restriction on the right to cut fruit trees, and we think we ought to follow the decision in *Rangayya Appa Row* v. *Kadiyala Rathnam*(7), in holding such a restriction to be necessary for the protection of the landlord's interest until the law is altered by the legislature.

With regard to the recent cases of *Narayana Ayyangar* v. *Orr* in(8) and *Kakarla Abbayya* v. *Raja Venkata Papayya Rau*(9), which have been cited for the appellant, we may observe that the first was a case in which the landlord sought to recover

(1) I.L.R., 20 Mad., 299.
(2) I.L.R., 23 Mad., 318.
(3) I.L.R., 4 Mad., 174.
(4) I.L.R., 13 Mad., 60.
(5) I.L.R., 22 Mad., 39 at p. 43.
(6) M.I.A., 295.
(7) I.L.R., 13 Mad., 249.
(8) I.L.R., 26 Mad., 252.
(9) I.L.R., 29 Mad., 24.

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BODDA GODDEPPA v. THE MAHARAJA OF VIZIANAGARAM.

the value of certain babul trees cut and removed by the tenant, while the second was a case in which, as appears by referring to the printed papers, the zamindar claimed to be entitled to the exclusive ownership of the trees and the fruits growing thereon. The question, whether the landlord's interest in the rent and the reversion makes it proper that the tenant should be restrained from cutting fruit trees, which is the question before us, did not arise directly, and, so far as we can see, was not considered in these cases.

We may observe, in conclusion, that, if we had been prepared to differ from *Rangayya Appa Row* v. *Kadiyala Rathnam*(1), on which both the lower Courts relied, it would have been necessary to remand the case for a finding on the question of contract, as it appears that ever since the varam system was departed from puttahs containing restrictions on the right to cut trees have been tendered and accepted and this would in the circumstances be strong evidence of contract.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Wallis.

1906. October 9, 10, 26.

KRISHNASAMI AYYANGAR AND OTHERS (FIRST, SECOND AND FOURTH DEFENDANTS), APPELLANTS,

v.

SAMARAM SINGRACHARIAR AND ANOTHER (PLAINTIFF'S REPRESENTATIVES AND THIRD DEFENDANT), RESPONDENTS.*

Jurisdiction—Removal or alteration of religious marks is an interference with property of which Civil Courts can take cognisance—Injunction against trustees of temples—No injunction to restrain an act which although an innovation does not interfere with worship.

Removal or alteration of namams or religious marks in a temple amounts to an interference with property and will be a ground for action in the Civil Courts.

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(1) I.L.R., 13 Mad., 249.

* Second Appeal No. 565 of 1904, presented against the decree of R. D. Broadfoot, Esq., District Judge of Chingleput, in Appeal Suit No. 82 of 1899, presented against the decree of the District Munsif of Conjeeveram, in Original Suit No. 431 of 1897.

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The trustees of a temple may be restrained by injunction from making unjustifiable changes which would affect the character of the temple as a religious institution.

KRISHNASAMI AYYANGAR v. SAMARAM SINGRA-CHARIAR.

Where, in a temple in which two rival sects following rival gurus have interest and worship, the trustee introduces a new metal idol, in addition to the existing stone idol of one of the rival gurus, such introduction when not effected at the expense of the temple, and when it does not interfere with the worship of the rival sect, is not inconsistent with the usage of the institution and ought not to be restrained by an injunction.

THE plaintiff and defendants were trustees of the Vishnavite temple at Tiruppakuli in which the rival sects of Vadagalai and Tengalai had the right to worship. The plaintiff and defendants Nos. 3 and 4 were Tengalais and defendants Nos. 1 and 2 were Vadagalais. The plaintiff's case was that from time immemorial only Tengalai namams were used on the idols, on the temple buildings, on the gates, flagstaffs and all prominent places; that the Vadagalais had only one stone stationary idol of their guru at the temple, and no processional idol; that recently the defendants with a view to convert the institution into a Vadagalai one removed the Tengalai marks, substituting Vadagalai namams and introduced a copper processional idol of the Vadagalai guru. The plaintiff prayed for an injunction to restrain the defendants from doing these acts. The District Munsif passed a decree in favour of the plaintiff granting all the reliefs claimed which was taken on appeal to the District Court. The District Court held that the suit was not maintainable as no sanction had been obtained by the plaintiff under Act XX of 1863. On appeal to the High Court, the decree of the District Judge was reversed and the case was remanded. The District Court, on remand, confirmed the decree of the District Munsif in favour of the plaintiff.

Defendants Nos. 1, 2 and 4 preferred this second appeal.

V. Krishnaswami Ayyar, *T. R. Ramachandra Ayyar*, *T. V. Seshagiri Ayyar*, *K. R. Krishnaswami Ayyangar* and *N. Rajagopalachariar* for appellants.

T. Rangachariar and *V. N. Kuppu Rau* for respondents.

JUDGMENT (MILLER, J.).—The plaintiff, a Dharmakarta of the Sri Vijayaraghavaswami temple at Tiruppakuli, sued his co-trustees praying for an injunction prohibiting them from changing the form of, or in any way interfering with, the Tengalai namams in the temple and directing them to remove from the temple a copper

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KRISHNASAMI AYYANGAR v. SAMARAM SINGRACHARIAR.

image of Vedanta Desikar introduced thereinto by them, and for a sum of Rs. 10 being the cost of restoring the altered namams to their original condition.

The questions for our decision are (1) whether the suit lies, (2) if so, is the plaintiff entitled to the injunction prayed for in respect of the namams and (3) is he entitled to have the copper idol removed from the temple?

I am clear that the suit lies. The stone and chunam namams are part of the property of the temple vested in the trustees, and their removal or alteration is an interference with the right of the plaintiff in respect of the property. He has therefore a right of suit by section 11 of the Code of Civil Procedure.

On the second question I think it is not shown to have been within the competence of the trustees to change Tengalai namams into Vadagalai namams in the temple in question.

Though the differences between the Vadagalai and Tengalai sects have not been made clear to us, and though they may be, as the District Munsif suggests, rather sentimental than doctrinal or religious, still there can be no doubt that those differences, whatever their origin and whatever their nature, have for more than a century resulted in a division of the community into parties, bitterly hostile to one another, and have given rise to frequent collisions between those parties. And there can be no doubt that the different namams have become the badges of the different parties so that the decoration of the walls, pillars, vigrahams, vahanams and vessels of a temple with a particular form of namam proclaims to those who may visit the temple that the predominating influence in the institution is that of the sect of which the namam displayed is the badge. Now in these matters I have no doubt that the only safe guide in this country is usage, and if the usage of this institution is found as it has been found to be Tengalai in character, it seems to me clear that a trustee of the temple if he claims a power in contravention of the usage to proclaim by a wholesale alteration of the form of namam displayed in the temple a change in the character of the predominating influence therein, must make it clear that he has that power. There is no doubt that a display of Vadagalai namams when Tengalai namams have always been displayed must necessarily be highly offensive to the Tengalai worshippers, and the trustees ought to show some justification for making such a change.

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The defendants in this case did not attempt anything of the sort. They said, "this is a matter of ritual and we cannot be interfered with by the Court," and they set up a false case of usage. They in effect admitted that the usage must govern their acts, but alleged that those acts were in accordance with and not in contravention of it. They did not urge that they were making improvements, and they did not assert that if the change which they endeavoured to effect was an innovation it was none the less within their powers to make it, though two of them (the first and second defendants) did make an assertion to this effect in regard to the introduction of the copper image of Vedanta Desikar.

A departure from usage such as is here found is *primâ facie* not within the power of the trustees, and the trustees have not shown or even alleged that in this case they have power to effect it. The lower Courts were consequently justified in restraining them from making the change.

On the remaining question I have come to the conclusion that the innovation complained of is not beyond the power of the trustees.

There is, *primâ facie*, no reason why they should not permit the devotees of Vedanta Desikar whose image in stone stands in the temple to introduce a second and portable image to be used if necessary in processional ceremonies. To permit this does not, it seems to me, in any way change the distinctive Tengalai character of the temple.

No doubt there has hitherto been no such image in the temple, but that does not in this case raise a presumption that there ought not to be one. It is not found that there is any usage of the temple prohibiting the use of Utsava vigrahams generally, and although the District Munsif is disposed to hold that the addition of Utsava vigrahams and the multiplications of ceremonies in honour of Acharyas and Alwars represented in minor shrines in the temple are detrimental to the worship of the principal deity to whom the institution is dedicated, still he does not go so far as to hold that the installation of such vigrahams is unusual. It may very well be that the trustees could not be permitted to expend the funds of the temple on ceremonies in honour of Vedanta Desikar which have not the sanction of usage and the performance of which would reduce the amount available for expenditure on more important festivals, but no such case is alleged here. It is

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not said that any temple money has been spent on the copper image.

The Tengalais, it may be, object to the presence of this image, but that is not necessarily a reason for removing it. The shrines at which they worship are unchanged and they do not and cannot allege that the introduction of the image is a sacrilegious act, for there exists already in the temple an image of the same Guru.

I am not pressed by any of the three unreported cases to which our attention was drawn. The earliest of them is no authority, for it did not go to the Sadar Court on the merits. In *Rama Patter* v. *Ramasami Sastrigal*(1) there was the introduction of an entirely new object of worship and in the case in which exhibit TT is the judgment the learned Judges seemed to consider that the sanctity of the temple was in jeopardy.

The District Munsif's finding that the introduction of the image is opposed to the usage of the temple seems to me to mean no more than that the image was recently introduced, and this is all that is found by the lower Appellate Court. Neither Court has found the existence of any established usage in the matter.

If it be found that the trustees in authorising what is not an improper act were actuated by a desire, as the District Munsif suggests, to stir up sectarian strife, that might possibly be a ground for removing them from office, but the question of their motive does not arise in this case. I am of opinion that the injunction on this point should not have been granted.

In the result I would modify the decree of the Courts below by striking out the direction to the defendants to remove the copper image from the temple, confirming it in other respects.

I would leave the parties to pay their own costs in this second appeal.

WALLIS, J.—I have come to the same conclusion. This is an appeal from a decree of the lower Appellate Court confirming a decree of the District Munsif which directed the defendants to remove from the temple in question the copper idol of Desikar and restrained them from altering the Tengalai namams in the buildings, vahanams, screens, idols and other things of the temple. The suit was brought by one of the trustees of the temple against

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(1) S.A. No. 1811 of 1897 (unreported).

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the remaining three trustees and another and was instituted without sanction under Act XX of 1863.

KRISHNASAMI AYYANGAR v. SAMARAM SINGRACHARIAR.

On this ground the District Judge dismissed the suit on appeal. His judgment was confirmed in *Samaram Singarachariar* v. *Krishnaswami Ayyangar*(1), but the Judges, Subrahmania Ayyar and Davies, JJ., differed and in *Samaram Singarachariar* v. *Krishnaswami Ayyangar*(2) Benson, Bhashyam Ayyangar and Russell, JJ., agreed with Subrahmania Ayyar, J., and held that no sanction under the Act XX of 1863 was necessary and remanded the case to the District Judge directing him, the District Judge, to restore it to his file and dispose of it according to law.

The District Judge has confirmed the decree of the lower Court and the case now comes to this Court on Second Appeal.

In his judgment in *Samaram Singarachariar* v. *Krishnaswami Ayyangar*(1) Subrahmania Ayyar, J., held it to be settled law that a trustee, even though a trustee of a public religious institution, could sue his co-trustees in respect of breaches of trust by the latter under the general law without any sanction under Act XX of 1863. And in *Samaram Singarachariar* v. *Krishnaswami Ayyangar*(2) the Full Bench agreeing in his judgment observed that, though a decision of the majority of the trustees of a public trust binds the minority in matters connected with the management of the trust property yet it does not bind them in matters which are *ultra vires* and beyond the proper sphere of the trust as the acts complained of in this were alleged to be, citing Lewin on 'Trusts,' 10th Edition, page 279. Whether the Dharmakartas of a Hindu temple are trustees in whom the temple properties are vested, or whether, according to the contention of Mr. Ganapathi Ayyar in his work on Religious Endowments, the better view is that under Hindu Law the temple properties are vested in the temple deity and the Dharmakartas are rather in the position of managers, it may in practice be necessary for Civil Courts to deal with them as trustees for the general body of worshippers of the temple. If, as Dharmakartas, they commit a breach of trust cognizable by the Civil Courts, they may be restrained at the suit of the other Dharmakartas or

(1) S.A. No. 683 of 1901 (unreported).
(2) L.P.A. No. 58 of 1902 (unreported).

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worshippers. The jurisdiction of the Courts, however, is only to try suits of a Civil as distinct from a religious or ecclesiastical nature. See as to this the judgment of the Sadar Court in 1861 in *Striman Sadagopa* v. *Kristna Tatachariyar*(1). And it does not, in my opinion, follow that a suit is a suit of Civil nature, merely because the facts constituting the cause of action are alleged to amount to a breach of trust. If on examination it should appear that they relate merely to religious rites or ceremonies such questions may of course be gone into as stated in the explanation to section 11 of the Civil Procedure Code if the right to property or an office depends on them. It has, however, been contended before us that as the temple trustees hold on trust to provide for carrying on public worship at the temple according to the mamul or usage of the institution every departure from such usage is a breach of trust for which they can be sued in a Civil Court. If this contention be accepted, the Courts will cease to be exclusively Civil Courts and will have imposed upon them the endless task of enforcing uniformity of worship as regards the rites and ceremonies in all the temples of the country according to the usage of each institution. In my opinion this goes too far and is opposed to authority. See *Vasudev and another* v. *Vamnaji and others*(2) which cannot, in my opinion, be distinguished merely on the ground that the plaintiffs there were a committee of management. Even in *Elayalwar Reddiar* v. *Namberumal Chettiar*(3) the case which appears to be most in the respondents' favour, Subrahmania Ayyar, J., limits the right of interference by the Civil Court to breaches of trust in respect of essential or important matters connected with the institution, and the decision in that case clearly involved a question of property, namely, the application of funds which were forthcoming for the performance of festivals. See also *Ramanuja Reddiar* v. *Namberumal Chettiar*(4) and *Janakirama Reddy* v. *Ramanujachari*(5), also *Krishnama* v. *Krishnasami*(6), *Venkata Varatha Thathachariar* v. *Anantha Chariar*(7), *Subbarâya Mudaliar* v. *Vedantachariar*(8), *Vanamamalai Bhashyakar* v. *Krishnaswami Thathachariar*(9). As to the

(1) 1 M.H.C.R., 301 at p. 304.
(2) I.L.R., 5 Bom., 80.
(3) I.L.R., 23 Mad., 298.
(4) A.S. No. 62 of 1901 (unreported).
(5) C.M.A. No. 205 of 1905 (unreported).
(6) I.L.R., 2 Mad., 62.
(7) I.L.R., 16 Mad., 299.
(8) I.L.R., 28 Mad., 23.
(9) 16 M.L.J., 150.

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right to have processions of idols carried out *Nagiah Bathadu* v. *Muthacharry*(1), *Loke Nath Misra* v. *Dasarathi Tewari*(2) and on the other hand *Subbaraya Gurukal* v. *Chellappa Mudali*(3) which it is not easy to distinguish.

The right of a worshipper to worship at a given temple is no doubt recognized by our Courts as a Civil right and the Courts will enforce by suit a right of worship to which the plaintiff proves himself entitled (*Venkatachalapathi* v. *Subbarayadu*(4)), and will also protect such right of worship as by restraining persons of inferior caste from being allowed into temples reserved for worshippers of a higher caste (*Narayanasami Gurukkal* v. *Irulappa*(5)), or by preventing the object of worship being removed so as to frustrate the right of worshippers (*Dhurrum Singh Mohunt* v. *Kissen Singh*(6)), or introduction of idols or other objects which interfere with the form of worship for which the temple is dedicated. The decisions of this Court in *Nagalingam Pillai* v. *Chinnummal*(7) reported at page 142 of the decisions of the Sadar Adalat, 1858 (*Sivasankara Tambiran* v. *Sengalam Gurukal*(8)) and *Rama Patter* v. *Ramasami Sastrigal*(9), in which the introduction of new idols or other objects was restrained are to be explained in my opinion on this last ground in spite of certain observations in the judgments going to show that the removal was ordered merely because they were newly introduced and not in accordance with mamul. As regards other innovations, whether by way of commission or omission, if they are sufficiently serious, they may of course give rise to a Civil suit for the removal of trustees, but this, in my opinion, is as far as Civil Courts should go (*Fazl Karim* v. *Maula Baksh*(10)). In the present case the Courts have directed the removal from a Vaishnavite temple, which is said to be a Tengalai temple in the sense that it must be taken to be dedicated for Vaishnavite worship mainly but not exclusively by the Tengalai sect, of a copper idol of Vedanta Desikar the patron of the rival sect of Vadagalais. The idol was ordered to be removed on the ground that it was an

(1) 11 M.L.J., 215.
(2) I.L.R., 32 Calc., 1072.
(3) I.L.R., 4 Mad., 315.
(4) I.L.R., 13 Mad., 293.
(5) 12 M.L.J., 355.
(6) I.L.R., 7 Calc., 767.
(7) S.A. No. 94 of 1858 (unreported).
(8) S.A. No. 773 of 1887 (unreported).
(9) S.A. No. 1811 of 1897 (unreported).
(10) I.L.R., 18 Calc., 448 at p. 558.

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KRISHNASAMI AYYANGAR v. SAMARAM SINGRA-CHARIAR.

unauthorized innovation, but no attempt appears to have been made to show that the introduction of this idol would interfere with the worship of the Tengalais at the temple.

As observed by the District Judge, before whom the case first came on appeal, the temple is one in which both Vadagalais and Tengalais have interest and worship, a stone idol and shrine of Vedanta Desikar have existed in the temple from of old, and the introduction of a metal idol is not shown to be an act inconsistent with the principles, rules, or usages of the institution or such as to interfere with any one's Civil rights. I am therefore of opinion that the District Judge was wrong in granting an injunction in regard to it.

The other question of the namams is not altogether free from difficulty, as the putting on or taking off of such things as namams are ordinarily not matters of Civil nature, but in this case the wholesale substitution of Vadagalai for Tenglai emblems in a Tengalai temple may, in my opinion, be regarded as an interference with the temple structure and the interference of the Civil Courts may be justified on the ground that the temple is property and that the Tengalais for whose worship it is, it must be taken to have been largely but not exclusively, dedicated, have a right to object to alterations in the temple structure which would affect its character as a Tengalai institution.

For these reasons I concur in the result arrived at by my learned brother.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice and Mr. Justice Wallis.

1906. September 27, 28.

APPASAMI AYYANGAR (COUNTER-PETITIONER, SECOND DEFENDANT AND JUDGMENT-DEBTOR), APPELLANT,

v.

RAMANATHAM CHETTIAR AND OTHERS (PETITIONER, PLAINTIFF, DECREE-HOLDER AND HIS LEGAL REPRESENTATIVES), RESPONDENTS.*

Principal and surety—Liability of surety — Liable for full amount decreed in the absence of any equity.

Where principal and surety are jointly sued and a decree is passed against both for a certain amount and against the principal for the full amount, including the amount jointly decreed, the contract of suretyship is merged in the decree and the surety, when the whole amount has not been recovered from the principal, remains liable for the balance to the extent of the amount decreed against him unless he can show some equity in his favour which entitles him to say that he is not liable for the full amount decreed against him. No such equity arises, because the amount recoverable by attachment and sale from the principal was reduced by rateable distribution among other creditors of the principal by an order under section 295 of the Code of Civil Procedure; nor can the surety claim that a proportionate share of the amount realised from the principal must go to reduce his own liability.

THE facts necessary for this report are set out in the judgment.

T. Narasimha Ayyangar for appellant.

K. Srinivasa Ayyangar for respondent.

JUDGMENT.—In this case the plaintiff sued defendants Nos. 1 and 3 as principal debtors and defendant No. 2 as surety. He obtained a decree for Rs. 3,000 in round figures against defendants Nos. 1, 2 and 3 and a decree for Rs. 5,000 in round figures (which included the Rs. 3,000) against defendants Nos. 1 and 3.

The plaintiff was unable to recover the whole amount of his judgment debt as against the principal debtors (defendants Nos. 1 and 3) out of decrees obtained by them against third parties which the plaintiff had attached, by reason of the fact that there were other creditors of defendants Nos. 1 and 3 and an order for rateable distribution had been made under section 295 of the Code

* Civil Miscellaneous Appeal No. 54 of 1904 presented against the order of M.R.Ry. K. Ramachandra Ayyar, Subordinate Judge of Negapatam, in Execution Petition No. 120 of 1903 (Original Suit No. 44 of 1898).

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of Civil Procedure. In the rateable distribution the plaintiff recovered as against defendants Nos. 1 and 3 a proportionate amount of his judgment debt in the ratio of the amount of that debt to the total indebtedness of defendants Nos. 1 and 3 to the creditors who were entitled to participate in the rateable distribution.

We are of opinion that the plaintiff is entitled to recover in execution as against the second defendant the total amount of the judgment debt of that defendant (assuming of course that, after allowing for the amount received by the plaintiff in the rateable distribution, Rs. 3,000, or more, remains due under the decrees), and that the second defendant is not entitled to deduct a proportion of the sums recovered by way of rateable distribution from the amount which is due from him under the decree against him. We do not think the doctrine of Bankruptcy law upon which the decisions in *Bardwell* v. *Lydall*(1), and in later cases (see, for instance, *Ellis* v. *Emmanuel*(2), *Ellis* v. *Wilmot*(3), *In re Sass*(4)) were based is applicable to the facts of this case. In the present case there is a decree against the second defendant for Rs. 3,000, and his rights and liabilities under his contract of suretyship are now merged in the decree against him. He is liable for the amount of the decree against him unless he can show some equity in his favour which entitles him to say that he is not liable for the amount. We do not think he has shown this. If the plaintiff had in execution obtained the full amount of the decrees attached by him, and the amount of such decrees was less than Rs. 2,000, the second defendant could not have been heard to say that he was entitled to any deduction from the amount due by him under the decree against him. He ought not to be in a better position because, by reason of the order for rateable distribution, the plaintiff has only recovered a proportionate amount of the attached decrees.

We think the decision of the lower Court was right, and we dismiss the appeal with costs.

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(1) 7 Bing., 489.
(2) 1 Ex. D., 157.
(3) L.R., 10 Ex., 10.
(4) (1896), 2 Q.B., 12.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Benson and Mr. Justice Miller.

1906. October 1, 5, 31.

LAKSHMI DOSS (RESPONDENT IN ORIGINAL SIDE APPEAL No. 11 OF 1905 ON THE FILE OF THE HIGH COURT, DEFENDANT), APPELLANT,

v.

ROOP LAUL AND OTHERS (APPELLANTS IN ORIGINAL SIDE APPEAL No. 11 OF 1905 ON THE FILE OF THE HIGH COURT, PLAINTIFFS), RESPONDENTS.*

Fiduciary relation—Parent and child, transaction between—Undue influence—Parent and even strangers claiming benefit bound to show that the child was a free agent and had independent advice—Delay and acquiescence, when a bar to equitable relief—Limitation Act XV of 1877, *sch. II, art.* 91—*Does not apply to defences.*

A parent stands in a fiduciary relation towards his child; and any transaction between them by which any benefit is procured by the parent to himself or to a third party at the expense of the child will be viewed with jealousy by Courts of Equity, and the burden will lie on the parent or third party claiming the benefit of showing that the child in entering into the transaction had the independent advice of persons who acted in his interests, that he thoroughly understood the nature of the transaction, and that he was removed from all undue influence when the gift was made.

Huguenin v. *Baseley*, (14 Ves., 299), referred to.

Allcard v. *Skinner*, (36 Ch.D., 145 at pp. 181, 182), referred to.

Delay and acquiescence will not bar the defendant's right to equitable relief unless he knew that he had the right, or being a free agent at the time, he deliberately determined not to inquire what his rights were or to act upon them.

Where beyond signing the deed the defendant does not do anything to show that he considered the deed effectual he will not be barred by mere lapse of time from setting up the invalidity of the deed.

Article 91 of schedule II of the Limitation Act applies only to suits by plaintiffs to have instruments avoided. A defendant may, by way of equitable defence, set up the invalidity of a deed, although his right to have it avoided by a suit has become time-barred.

Jugaldas v. *Ambashankar*, (I.L.R., 12 Bom., 501), distinguished.

Ranganath Sakharam v *Govind Narasinv*, (I.L.R., 28 Bom., 639), referred to and followed.

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* Appeal No. 77 of 1905 under Section 15 of the Letters Patent, presented against the judgment of Sir S. Subrahmania Ayyar, Officiating Chief Justice, in Original Suit Appeal No. 11 of 1905, presented against the judgment of Mr. Justice Boddam in Civil Suit No. 166 of 1903.

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LAKSHMI DOSS v. ROOP LAUL.

The facts necessary for this report are set out in the judgment.

Mr. *E. Norton* and Mr. *A. Read* for appellant.

K. Narayana Rau and *C. P. Ramaswamy Ayyar* for respondents.

JUDGMENT.—This suit was dismissed by Boddam, J. On appeal Sir Subrahmania Aiyar, J., was of opinion that the appeal should be allowed. Sankaran Nair, J., was of opinion that it should be dismissed. The decision of the senior Judge prevailed. The defendant now appeals under the Letters Patent. The plaintiffs claim payment of certain annuities which they allege are due to them under the provisions of an indenture made between one Eswara Doss and the defendant, on January 28, 1887. The claim raises the question of the validity and effectiveness of the deed of 1887.

The defendant is the adopted son of one Eswara Doss. Eswara Doss was the son of one Teekamchand. Plaintiffs Nos. 1 to 4 are the sons of one Muni Lall who was the illegitimate son of one Kundan Lall who was the brother of Teekamchand. Plaintiffs Nos. 5 and 6 are the widow and a minor daughter of a deceased son of the first plaintiff. The family is undivided. On the death of Kundan Lall in 1860, Eswara Doss became entitled by survivorship to the whole of the family property which was of considerable value. In 1873 he adopted the defendant. He died in 1900. At the date of his death, although there is no direct evidence on the point, it would seem that the family property amounted to several lakhs of rupees.

The all important question in this case is the question of alleged undue influence in connection with the signing of the deed of 1887 by the defendant. This question divides itself into two branches—first, was the deed of 1887 voidable by the defendant on the ground that his signature thereto was secured by the undue influence of his adoptive father? Secondly, if it was, is the defendant entitled, in the events which have happened, to set this up as a defence to the plaintiffs' claim in the present suit?

The defendant was adopted when quite a child and he lived with his adoptive father, he and his father being the only members of the undivided family, till his father died in 1900. At the time of the execution of the deed the defendant had recently attained his majority. Eswara Doss appears to have been a man of

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considerable strength of character and business ability. The recitals in the deed must be taken to be true at any rate as against him. From them it would appear that he considerably increased the family fortune. On the other hand, the learned Judge who tried the suit, and who heard the defendant give his evidence, describes him as "far from bright or intelligent." It would seem from the evidence that the defendant, though no longer a boy, was still at school at the time he executed the deed. This, in itself, would seem to show that he was below the average in intelligence. We do not think, however, that much stress need be laid on this aspect of the case, since there can be no question that the parties stood in a fiduciary relation—that of father and son. The defendant stated in his evidence that he took no part in the business, that his father did not tell him about the properties, and that he did not discuss the family charities with him. The deed is a long and complicated document, and some of its provisions are not easy to construe.

Our learned brothers who heard this appeal in the first instance took opposite views as to the construction of certain provisions in the deed which were referred to, in the course of the argument, as the "substitution clause"—provisions which would seem to go to the root of the question whether the instrument is, or is not, effective as a trust deed. The deed was prepared by Messrs. Branson & Branson who have been described as the family solicitors. We think, however, there can be little doubt that they regarded Eswara Doss as their client, and that they did not conceive they were under any obligation to protect the interests of the defendant It is not suggested that the defendant had any independent advice. The deed was witnessed by Mr. R. Branson and Mr. W. Branson, but the defendant stated, positively; in the witness box, that these gentlemen were not present when he signed it. There is appended, at the end of the schedules, a statement that the deed was explained to the defendant by C. Rajamannar Naidu, who was Messrs. Bransons' manager. The defendant stated that he did not recollect if the deed was read out or explained to him, that he was asked to sign it, and he signed. In cross-examination he said that no one told him anything about the contents and that the whole thing took about five minutes. The deed was executed on the very day on which Eswara Doss and the defendant started on a journey to Benares.

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The defendant stated that he was packing at the time and he was excited about it. On such an occasion it is not likely he would resist any moral pressure his father might bring to bear, and he would naturally be in a frame of mind which would make him unwilling to refuse to join in what Eswara Doss no doubt regarded as an act of piety. Eswara Doss apparently regarded the visit to Benares as too important to permit of a short delay for the purpose of registering the instrument. Father and son started for Benares on the day the deed was executed, and a power of attorney was executed to Messrs. Branson & Branson to register the instrument. The deed was deposited with Messrs. Branson & Branson and remained in their custody till Eswara Doss died in 1900. Messrs. R. Branson and W. Branson and the manager are dead, and no evidence is available to contradict the defendant as to the circumstances in which the deed was signed. Probably the deed was read over to the defendant and it is not unlikely that some explanation of its terms was given to him. But, in other respects, we see no reason to suppose that the evidence of the defendant as to the circumstances in which the deed was executed is not substantially true. It is at any rate clear from the terms of the deed itself that Eswara Doss regarded the defendant as little better than a cipher and that he was prepared to treat his interest in the family property as an undivided member of the family as practically non-existent. These circumstances go a long way to show that the defendant in signing the deed did not act as a free agent. Indeed Sir Subrahmania Ayyar, J., apparently was not prepared to go the length of holding that he did. The learned Judge observes:—"Nevertheless had the execution "of the instrument by the defendant involved a transfer of his "property to any appreciable extent for the benefit of Eswara Doss "or of something which Eswara Doss wished to serve, I should "view the transaction with that jealousy with which Courts most "properly regard transactions between persons standing in the "fiduciary relation of parent and child whereby an advantage is "secured to the former at the expense of the latter, and hold, "in accordance with the principle laid down over and over again "in the decisions to which the Advocate-General called our "attention, that the execution of the instrument took place under "circumstances which threw upon the parties claiming under it "the *onus* of establishing the good faith of the transaction beyond

"the shadow of a doubt." But the learned Judge was of opinion that the instrument must be held good since it brought about no transfer of the defendant's property, and Eswara Doss obtained no advantage or benefit such as would bring the case within the doctrine of equity. This opinion of the learned Judge is based largely on the view that the recitals to the deed are true. The recitals set out the setting apart of a sum of Rs. 2,000 for certain charities by the grandfather of Eswara Doss, an increase of the charity fund to Rs. 20,000 on the death of Eswara Doss' father, an increase to about a lakh of rupees when Eswara Doss' uncle Kundan Lall died in 1860, and an increase at the date of the deed to about a lakh and fifty thousand rupees. There is practically no extrinsic evidence as to the truth of these recitals, and with all deference to our learned brother we do not think that, as against the defendant, they must be taken to be true. Eswara Doss could not be heard to say that they were not true, but the question whether the defendant is in the same position depends upon whether he is bound by his signature to the deed, which is the very question we have to decide. But even assuming the recitals to be true, it seems to us that Eswara Doss derived substantial benefits under the deed, and that the effect of the deed was to subject the defendant to substantial loss. The deed declares in terms that the charities are private charities. The trust, if any, was one which could at any time have been put an end to by the members of the family for the time being. The deed which vests the properties in Eswara Doss as trustee secures to him the sole control of the charity funds during his life-time and the sole control over the annuities for which the deed makes provision.

The deed gave Eswara Doss the right of nominating his successor. The provision in the deed that, failing appointment by Eswara Doss the defendant should succeed to the trusteeship was entirely illusory, since on the very day the deed was executed Eswara Doss executed a will appointing the Official Trustee to be trustee after Eswara Doss' death.

We are prepared to deal with the case on the assumption that a valid trust had been created by Eswara Doss' grandfather, that the trust fund grew as stated in the recitals and that Eswara Doss had all the rights of a trustee by succession as the eldest male heir of a deceased trustee. We are prepared further to assume that the properties mentioned in schedule A, including the tenth item

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Rs. 1,50,000 cash were subject to trusts which had been created prior to the date of the instrument. Besides the Rs. 1,50,000 mentioned as item 10 in schedule A, the deed provides that a further sum of Rs. 1,50,000 should be set apart from "the settler's general estate" and be held subject to the trusts created by the deed. It cannot be suggested that this second sum of Rs. 1,50,000 had, prior to the date of the instrument, formed part of any family trust. Nor, apart from the recital is there any evidence to prove, or reason to suppose, that this sum was self-acquired property of Eswara Doss in which his adopted son (the defendant) had not acquired a co-parcener's interest by his adoption. In our view, the defendant, as a member of the undivided family, was interested jointly with his father in this sum of Rs. 1,50,000 which, at the date of the instrument, was not subject to any trust even if a trust existed in connection with the properties mentioned in schedule A. The deed purports to vest this sum in Eswara Doss as trustee. In the deed, Eswara Doss is referred to throughout as the settler. But even if he could be properly described as the settler with regard to the properties mentioned in schedule A it is quite clear that as regards this Rs. 1,50,000 the defendant was a joint settler with Eswara Doss. The effect of the deed is to extinguish the defendant's joint interest in this large sum and to vest it solely in Eswara Doss as trustee.

It seems to us that this case falls within the second group of cases referred to by Lord Lindley in *Allcard* v. *Skinner*(1), to which the equitable doctrine of undue influence applies. "The second group," says Lord Lindley, "consists of cases in which the position "of the donor to the donee has been such that it has been the duty "of the donee to advise the donor, or even to manage his property "for him. In such cases the Court throws upon the donee the "burden of proving that he has not abused his position, and of "proving that the gift made to him has not been brought about "by any undue influence on his part. In this class of cases it has "been considered necessary to show that the donor had independent "advice, and was removed from the influence of the donee when "the gift to him was made."

The principle in cases such as this was laid down by Lord Eldon in *Huguenin* v. *Baseley*(2), and was adopted by Lord Lindley in

(1) 36 Ch.D., 145 at pp. 181, 182. (2) 14 Ves., 299.

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Allcard v. *Skinner*(1). "Take it," said Lord Eldon, "that she (the "plaintiff) intended to give it to him (the defendant): it is by no "means out of the reach of the principle. The question is, not, "whether she knew what she was doing, had done, or proposed "to do, but how the intention was produced: whether all that care "and providence was placed round her, as against those who "advised her, which, from their situation and relation with respect "to her, they were bound to exert on her behalf" (see *Allcard* v. *Skinner*(1)).

We are of opinion that the deed of 1887 was voidable by the defendant.

The second branch of the question—Is the defendant entitled to set up the plea of undue influence as a defence to the present suit?—presents greater difficulties.

It has been contended on behalf of the plaintiff that there have been delay, acquiescence and laches on the part of the defendant and that, by reason thereof, he can no longer rely upon any equitable rights which he may at one time have had. Delay and acquiescence would not bar the defendant's right to equitable relief, unless he knew that he had the right, or being a free agent at the time, deliberately determined not to inquire what his rights were or to act upon them.

Now, in this case, the evidence shows that during Eswara Doss' life-time nothing occurred to bring home to the defendant's mind that he had practically surrendered his interest, as an undivided member of the family, in the family property. In fact it would seem to have been Eswara Doss' intention that the defendant should remain in the dark as to this. No doubt the deed was registered, but the execution of the deed was effected with as little publicity as possible. One would have expected the defendant's natural father, who, as would appear from the deed itself, as closely connected with Eswara Doss in one branch of his business (the Rs. 1,50,000 employed in the salt trade) would have been an attesting witness to the deed. No doubt the natural father was a beneficiary to a small extent under the deed, but this does not appear a satisfactory explanation of the fact that he was not asked to be an attesting witness. The deed was registered under a special power of attorney after father and son had left for Benares. The

(1) 36 ch. D., 145 at pp. 181, 182.

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deed was deposited with Messrs. Branson & Branson, and things went on precisely as they had done prior to its execution. With regard to this part of the case the learned Judge who tried the suit sums up the evidence thus—"No alteration was made in his "way of dealing with his properties or the maintenance of the "plaintiffs and others. No property was in fact set aside for "charity. No fresh books were opened, and affairs continued "to be conducted just as if no deed had ever been executed up to "the time of his death. He paid whom he liked and what he "liked. He sold property and brought property, and in spite of "the provision in the deed that Byragis and Brahmins should be "fed for two days, he first stopped feeding them for a time and then "he fed them for one day only."

After Eswara Doss' death, according to the defendant's evidence, the defendant made payments to some of the persons whom his father had paid but stopped paying some and paid others whom his father did not pay. He paid as he pleased.

The father died in 1900. From the date of the execution of the deed till the death of Eswara Doss in 1900, we think the evidence shows that the plaintiff continued in ignorance as to the effect of the deed and as to his right to impeach it. In the year the father died, a suit was instituted by the first plaintiff which raised the question of the validity of the deed and this suit was defended by the defendant. In these circumstances we are of opinion there has been no delay or acquiescence on the part of the defendant which disentitles him from relying on the defence set up in this suit. It would no doubt have been open to the defendant, as soon as it came to his knowledge that the first plaintiff intended to assert his alleged rights under the deed, to take steps to have the deed set aside. But seeing that litigation was commenced by the first plaintiff shortly after Eswara Doss' death, we think the fact that the defendant did not himself institute a suit to have the deed set aside does not amount to delay or acquiescence so as to preclude the defendant from impeaching the validity of the deed in this suit. In *Wright* v. *Vanderplank*(1) there was a delay of ten years. The suit was dismissed. With regard to the delay, Turner, L.J., said "As to "the time which has elapsed, if the case had rested on time only

(1) 8 D., M. & G., 133.

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"much might have been said in favour of the plaintiff's claim." In dismissing the action he relied on the way in which the donor had dealt with the property as recognising the deed as effectual. In the present case there is no evidence to show that, beyond attaching his signature to the instrument, the defendant ever did a single act which could be said to show he recognised the deed as effectual. In the case of *Allcard* v. *Skinner*(1) the plaintiff was fully cognisant of the effect of the transactions to which she had been a party. More than six years elapsed between the time she left the sisterhood and the bringing of her action. But even in that case, the Court of Appeal were not prepared to hold that the delay in itself was a bar to any claim for relief. Lord Lindley said (p. 186):—"It is not, however, necessary to decide whether "this delay alone would be a sufficient defence to the action. "The case by no means rests on mere lapse of time. There is "far more than inactivity and delay on the part of the plaintiff. "There is conduct amounting to confirmation of her gift."

Acquiescence such as would bar a claim to relief which would otherwise be good, as Lord Lindley pointed out elsewhere in his judgment, is a question of fact. The conclusion which the learned Judge came to in that case was that the plaintiff "deliberately "chose not to attempt to avoid her gifts but to acquiesce in them, "or, if the expression be preferred, to ratify or confirm them."

Lord Bowen, in concurring with Lord Lindley, said:—"In "my view, this appeal ought to be dismissed, and dismissed on the "ground that the time which has elapsed, though not a bar in "itself, though not accurately to be described as mere laches which "disentitles the plaintiff to relief, is nevertheless, coupled with the "other facts of the case, a matter from which but one reasonable "inference ought to be drawn by men of the world—, namely, that "the lady considered her position at the time, and elected and "chose not to disturb the gift which she then at that moment "felt, if she had the will, she had the power to disturb." As has been pointed out, there is nothing in the present case to show election or ratification on the part of the defendant.

We of course do not overlook the fact that the present case differs from all the authorities in which the question has been discussed, in that the case of undue influence is raised not as a

(1) 36 Ch.D., 145 at pp. 181, 182.

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ground of attack but as a weapon of defence. It may be that in such a case the fact that the relation between the parties was fiduciary is not enough in itself to cast upon the donee the onus of showing that the donor was duly protected, and that the donor must show affirmatively that undue influence was in fact brought to bear upon him. But the principle is the same, and, in our view, if the onus be on the defendant that onus has been discharged.

It makes no difference in the present case that the claim under the deed is made not by the donee but by a third party. In *Huguenin* v. *Baseley*(1) Lord Eldon said:—"Whoever receives "the gift must take it tainted and infected with the undue "influence and imposition of the person procuring the gift; his "partitioning and cantoning it out amongst his relations and "friends will not purify the gift, and protect it against the equity "of the person imposed upon. Let the hand receiving it be ever "so chaste, yet, if it comes through a polluted channel, the "obligation of restitution will follow it." Even if in the present case the plaintiffs are to be regarded as *bonâ fide* purchasers without notice this would only affect the question of the onus of proof see *Blackie* v. *Clark*(2).

As regards the question of limitation, even assuming that the facts entitling the defendant to have the deed set aside became known to him more than three years before this suit was brought against him, we are unable to agree with the view of Sir Subrahmania Ayyar, J., that article 91 of the second schedule to the Limitation Act applies in this case and that the defence of the defendant is time-barred. We do not think it follows that because a party's remedy as plaintiff to have an instrument avoided is time-barred, his right to say, by way of equitable defence if sued, that the instrument ought not to be enforced, is equally time-barred. Delay is, of course, an equitable reply to the equitable defence, but we do not think it can amount to a statutory bar. No doubt Sir Charles Sargent in *Jugaldas* v. *Ambashankar*(3) held that the defendant in that case was debarred by the Limitation Act from pleading that a certain purchase was void, but the question for determination in that case was whether the defendants who were tenants could impeach a sale by their

(1) 14 Ves., 299. (2) 15 Beav., 595.
(3) I.L.R., 12 Bom., 501.

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own landlords which the landlords had taken no steps to have set aside within the period of limitation allowed by law.

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No other authority was cited at the bar to show that the general rule is not that stated by Sir Lawrence Jenkins in *Ranganath Sakharam* v. *Govind Narasin*(1).

In our judgment the deed of 1887 is not enforceable as against the defendant on the ground that his consent thereto was secured by undue influence. This being our view, it is not necessary to discuss the other questions raised in the case. We think the appeal must be allowed and the plaintiff's suit dismissed. In all the circumstances we think the proper order as to costs is that the parties should pay their own costs throughout.

Messrs. *Branson & Branson*, attorneys, for appellant.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Wallis.

EMPEROR

v.

SAMUEL AND OTHERS.*

1906. September 3, 13, 20.

Penal Code Act—XLV of 1860, *s.* 342—*Officer arresting and confining judgment-debtor in house of judgment-creditor not guilty of wrongful confinement.*

An officer arresting a judgment-debtor, under a warrant which directs him to produce the judgment-debtor when arrested before the Court with all convenient speed, is not guilty of wrongful confinement if, having effected the arrest when the Court is not sitting, he confines him in the house of the judgment-creditor. His duty is to produce the judgment-debtor at the next sitting of the Court and until he so produces him, he is responsible for his safe custody.

THE facts necessary for this report are set out in the judgment.

The Government Pleader (Mr. *E. B. Powell*) for appellant.

P. R. Sundara Ayyar for first accused.

The Hon. Mr. *P. S. Sivasvami Ayyar* for second and third accused.

JUDGMENT.—This is an appeal against the judgment of the Sub-Divisional Magistrate of Melur acquitting the accused and

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(1) I.L.R., 28 Bom., 639.

* Criminal Appeal No. 243 of 1906 presented under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused in Appeals Nos. 112 and 113 of 1905 by M.R.Ry. V. S. Sambasiva Ayyar, Sub-Divisional Magistrate of Melur Division.

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EMPEROR v. SAMUEL.

reversing the judgment of the Second-class Magistrate of Madura Town who had convicted the accused under section 342, Indian Penal Code, of wrongfully confining the complainant, a judgment-debtor arrested in execution, in the decree-holder's house. The first accused is an Amin of the District Court and had been entrusted by the Nazir according to the usual practice with the execution of the warrant for the complainant's arrest. The second accused is the decree-holder's brother, and the third accused is the decree-holder's son, and they were included in the charge as having helped the first accused to confine the complainant in the decree-holder's house. Assuming that he did, what we have to consider is whether it was wrongful within the meaning of section 342, Indian Penal Code. The main question is was it authorised by the terms of the warrant? The warrant which was issued on 15th April 1905 and addressed to the Nazir directed him to arrest the complainant and to bring him before the Court with all convenient speed, and was made returnable on or before 14th June with an endorsement showing the date of execution or why it had not been executed. It appears to have been handed to the first accused on the date of issue, and pursuant to it he arrested the complainant on Saturday April 22nd at 9 A.M. This was during the Easter holidays when the Court was not sitting and the first accused is found to have taken the complainant to the decree-holder's house and to have confined him there until 7-30 on the same evening when he was taken out, and again from 10 P.M. the same night until 6 P.M. on the following morning, when he was again taken out. This time he was not taken back, but was taken before the Nazir who apparently allowed him to go to his own house in the custody of two peons and he was duly produced before the Court when it sat again on Tuesday April 25th. In our opinion the first accused cannot be said to have been guilty of wrongful confinement in confining the complainant in the decree-holder's house. The arrest on Saturday the 22nd was admittedly lawful, and the execution of the warrant could only be completed by bringing the complainant before the Court when it next sat on Tuesday the 25th.

We are unable to accept the contention that the direction in the warrant to bring the accused before the Court with all convienient speed made it his duty to take the complainant to the Court building, or to the Judge of the Court at his private residence

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or wherever he might happen to be, or to take him before the Nazir. We think that under the warrant the legal duty of the first accused was to produce the complainant at the next sitting of the Court and that in the meantime he was responsible for his safe custody, and liable, among other things, to a suit by the decree-holder if he allowed the complainant to escape. Under these circumstances he was necessarily empowered to confine the complainant in the interval, and the law does not prescribe where he should be confined or prohibit confinement in the decree-holder's house. In many cases the arresting officer is content to accompany the judgment-debtor to his own house and to keep him in what has been called free custody but he is under no obligation to do so.

In England the statute law imposes certain restrictions upon the Sheriff's officer as to the places where persons under arrest may be confined (see now section 14 of the Sheriff's Act, 1887), but there are no such provisions in this country. If the arresting officer exercises his powers harshly or objectionably he can be dealt with administratively, or the law can be altered, but in the present state of the law an arresting officer who confines a judgment-debtor in the decree-holder's house whilst waiting to produce him before the Court is not guilty of wrongful confinement. It has been argued before us that confinement in itself lawful may be attended with such oppression as to render it wrongful within the meaning of section 342, Indian Penal Code, but it is unnecessary to consider this question as nothing that could possibly have that effect is alleged or proved here.

The appeal is dismissed.

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APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1906. August 28. September 6.

DORASAMI NAIDU AND OTHERS

v.

EMPEROR.*

Criminal Procedure Code—Act V of 1898, *s.* 106 (3)—*Order for security cannot be made by Appellate Court when original conviction not by one of the Courts specified in the section.*

An order for security cannot be made under section 106 (3) of the Code of Criminal Procedure by a Court of Appeal or Revision which is one of the Courts specified in the section, when confirming the original conviction of a Court which is not one of those specified therein.

Muthia Chetty v. *Emperor*, (I.L.R., 29 Mad., 190), referred to and doubted.

THE petitioners were convicted by the Second-class Magistrate of Arantangi of offences under sections 143, 147 and 323 of the Indian Penal Code and sentenced to pay a fine for Rs. 30 each. On appeal, the Sub-Divisional First-class Magistrate confirmed the conviction and further directed the petitioners to execute bonds for keeping the peace under section 106 (3) of the Code of Criminal Procedure.

The petitioners presented this petition to the High Court under sections 435 and 439 of the Code of Criminal Procedure.

Mr. *T. Richmond* for petitioners.

The Acting Public Prosecutor *contra*.

ORDER.—In this case certain persons were convicted of offences punishable under sections 147 and 323 of the Indian Penal Code by a Second-class Magistrate and were sentenced to fine. On appeal, the Sub-Divisional Magistrate dismissed the appeal and directed the appellants to give security to keep the peace under section 106 (3) of the Code of Criminal Procedure.

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* Criminal Revision Case No. 218 of 1906, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of M.R.Ry. T. Seshiah, First-class Sub-Divisional Magistrate, Pattukkottai Division, in Criminal Appeals Nos. 16 to 30 of 1906, preferred against the judgment of M.R.Ry. M. Agnisamy Pillai, Second-class Magistrate of Arantangi, in Calendar Case No. 383 of 1905.

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We are asked to revise this order on the ground, *inter alia*, that an Appellate Court cannot pass an order under section 106 (3) unless the convicted person has been convicted by one of the Courts specified in clause (1) of the section; that is, by a Court not inferior to a Magistrate of the first class, and that, in the present case, the conviction was by a Second-class Magistrate. The contention of the petitioner is opposed to the decisions of a single Judge of this Court in *Peria Veera Muppan* v. *Emperor*(1) and *Muhamed Abdul Kadir* v. *Emperor*(2), but it is in accordance with the decisions of this Court in the case of *Muthia Chetty* v. *Emperor*(3), and that decision was followed by a single Judge in *Pachimuthu Gounden* v. *Emperor*(4), and by a Bench of two Judges in *Paramasiva Pillai* v. *Emperor*(5). The question is, therefore, concluded by authority, and we set aside so much of the First-class Magistrate's order as directs security to be taken. In other respects there are no grounds for revision.

Although we are not prepared to dissent from the construction which has been placed on clause (3) of the section, having regard to the language used, yet we think it may well be doubted whether the Legislature intended that the power of the Appellate Court and of the High Court when exercising its powers of revision, should be confined to such narrow limits.

The requirements essential to justify on order to give security to keep the peace would, in reason, seem to be—

(*a*) a finding by a Court not inferior to a First-class Magistrate that an offence of the kind specified in the section has been committed, and

(*b*) a finding by such a Court that, in all the circumstances of the case, an order to give security is desirable.

The former of these essentials is satisfied when an Appellate Court confirms a conviction of such an offence by a Second or Third-class Magistrate just as much as when the conviction originates with it. That the Legislature does not always deem proceedings by a Second or Third-class Magistrate an insufficient basis for an order to give security to keep the peace is clear from

(1) Crl. R.C. No. 133 of 1903 (unreported).
(2) Crl. R.C. No. 328 of 1905 (unreported).
(3) I.L.R., 29 Mad., 190.
(4) Crl. R.C. No. 66 of 1906 (unreported).
(5) I.L.R., 30 Mad., 48.

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DORASAMI NAIDU v. EMPEROR.

section 349 of the Code of Criminal Procedure which enables a Second or Third-class Magistrate who is of opinion that a person who is being tried before him is guilty, and ought to be bound over under section 106, to record his opinion and forward the accused with his proceedings to the District or Sub-Divisional Magistrate to whom he is subordinate and empowers the latter to pass sentence and to make an order under section 106.

No doubt in such a case the actual conviction is by a First-class Magistrate, but as the conviction may proceed solely on a consideration of the evidence taken, and the opinion formed, by the Second or Third-class Magistrate, it is difficult to see any essential difference between such a case and one in which the First-class Magistrate, as a Court of Appeal, confirms a conviction by a Second or Third-class Magistrate.

It is apparently in regard to the order to keep the peace that the Legislature requires the safeguard of a Superior Court's discretion, and it also requires as a basis a finding by a Superior Court that the accused is, in fact, guilty of one of the specified offences. But, as we have already said, there is this basis when an Appellate Court confirms on appeal, a conviction by a Second or Third-class Magistrate just as much as when a District or Sub-Divisional Magistrate acts under section 349 on evidence recorded by a Second or Third-class Magistrate. Whether the view which this Court has taken as necessitated by the language of section 106 (3) or whether the view we have suggested as the probable intention of the Legislature, more correctly represents the true intention of the Legislature, it is desirable that the terms of the section should be made explicit, as our experience shows that the Appellate Courts very generally understand the section in the way which this Court has held to be incompatible with the true construction of the language used.

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PRIVY COUNCIL.

SADAGOPA CHARIAR AND OTHERS (PLAINTIFFS),

v.

KRISHNAMOORTHY RAO (REPRESENTATIVE OF RAMA RAO) AND OTHERS (DEFENDANTS).

P.C.*
1907.
February 15.
March 21.

[On appeal from the High Court of Judicature at Madras.]

Processions—Public worship of idol—Claim to exclusive right to have procession in public streets—Dispute between rival sects of Vaishnava Brahmins—Streets vested in Local Board under Madras Local Boards Act (Madras Act V of 1884)—Res judicata—*Ownership of land in village—Presumptive dedication to idol.*

The plaintiffs, members of the community of the Vadagalai sect of Vaishnava Brahmins, claimed the exclusive right to public worship of their idol and processions in its honour in the public streets of the village where they resided, and to prohibit the defendants, members of the Tengalai sect in the same village from publicly worshipping the Tengalai idol or carrying it in processions in the public streets. The claim was based on the grounds (1) that the Vadagalais were the original owners of all the land of the village and only allowed houses to be built and streets formed subject to the reservation that no worship or procession of a Tengalai idol should be allowed in them, thus dedicating them to their own idol; (2) that, in the alternative, they had by immemorial usage and custom the right to prevent such worship or processions in the streets; and (3) that so far as the Tengalai idol was concerned the rights of the parties were *res judicata* by the decision in a former suit:

Held, that the ownership of the village by the Vadagalais was not proved, nor any dedication of the streets exclusively to their idol; and that no such custom as alleged had been established; the village was an ordinary ryotwari village; the streets were public streets now vested, under the Madras Local Boards Act (Madras Act V of 1884) in the Local Board. All members of the public had an equal right in them. If the Vadagalais had any objection to the streets being so vested, they had had the opportunity when the Act was passed of raising the objection by appeal to the Governor-General in accordance with the provisions of the Act. Not having done so it was now too late to set up any claim.

Held also, that the former suit was not a representative suit binding property, nor a suit framed for the purpose of binding the Tengalai sect for all time. It was a suit against certain persons alleged to be wrong doers in their individual capacity: the decision in it was therefore not *res judicata* in the present suit.

APPEAL from a judgment and decree (August 21st, 1902) of the High Court at Madras which affirmed a judgment and decree (October 23rd, 1900) of the District Judge of South Arcot.

* *Present:* Lord MACNAGHTEN, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

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SADAGOPA CHARIAR v. KRISHNAMOORTHY RAO.

The main question for decision on this appeal was as to the right asserted by the appellants who were Vaishnava Brahmins of the Vadagalai sect, to prevent the respondents, also Vaishnava Brahmins but of a different sect named Tengalai, residing in the same village from using certain public streets for the worship of the Tengalai saint or idol, and for processions in its honour.

The facts are fully given in the report of the case before the High Court (DAVIES and BENSON, JJ.) *Sadagopachariar* v. *Rama Rao*(1).

On this appeal *Cohen*, *K.C.*, and *L. DeGruyther*, for the appellants, contended that they had established a right in law to each and all of the reliefs sought for in the plaint. Their first ground of suit was that the Vadagalais were the original owners of all the land of the village Tiruvendipuram, and had allowed houses to be built and streets made subject to the reservation that no worship or procession of a Tengalai idol should be allowed in them. The appellants claimed an exclusive right of procession in certain streets, a circumscribed area, not a right to prevent any one else from exercising public worship in a large or indefinite area. A special dedication of the streets in which the right was claimed was made 700 years ago (see *Sadagopachari* v. *Krishnamachari*(2)). Under the circumstances of the case, it was submitted, there was a presumption that the appellants' right originated in a grant to them of what they now sought to enforce in the present suit. The right had a legal origin and the presumption was that the Vadagalais were the original owners of the village, or if not, that the owners consented to the dedication to their idol of certain streets for its processions, and allowed others to use the streets subject to the reservation for the worship of any other idol than that of the Vadagalais. The right had been upheld on several occasions when it was contested by the Tengalais in 1807, 1828 and 1840.

The second ground was that even if the original ownership of the Vadagalais could not now be proved they had, by immemorial usage and custom, acquired the right to prevent processions and worship of any other idol than their own in the streets of the village. They had for a very long period prevented the Tengalais from worshipping their idol and having processions in the streets

(1) I.L.R., 26 Mad., 376.

(2) I.L.R., 12 Mad., 356.

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over which they claimed to exercise the right now in dispute; and so had established a custom which was recognised by the Sadr Adalat in 1840.

The third ground was that at any rate so far as the idol Manavala Mahamuni was concerned the rights of the Tengalais to carry it in processions was limited by the decree of the Sadr Adalat in 1840 in the suit of 1828 which was *res judicata* in this suit.

The following authorities were referred to: As to the right to maintain such a suit—*Anandrav Bhikaji Phadke* v. *Shankar Daji Charya*(1), *Srikhanti Narayanappa* v. *Indupuram Ramalingam*(2), and *Cockburn* v. *Thompson*(3). As to the possession of such exclusive rights—*Johnson* v. *Barnes*(4). As to the presumption of a legal origin—*Clippens Oil Company* v. *Edinburgh and District Water Trustees*(5) and *Phillips* v. *Halliday*(6). As to the reasonableness of a custom—*Tyson* v. *Smith*(7). As to the former decisions being *res judicata*—*Kaveri Ammall* v. *Sastri Ramier*(8), *Jenkins* v. *Robertson*(9), *Commissioners of Sewers for City of London* v. *Gellatly*(10), and *Parthasaradi Ayyangar* v. *Chinna Krishna Ayyangar*(11). Reference was made to the Madras Local Boards' Act (Madras Act V of 1884), section 3, clause (ix), as to the definition of "street" which excluded private property, and it was submitted that though the streets were vested in the municipal authorities, the Acts so vesting them gave the municipality no rights in the sub-soil—*Sundaram Ayyar* v. *Municipal Council of Madura*(12) and *Mayor, &c., of Tunbridge Wells* v. *Baird*(13): nor was any private right interfered with by the streets having so vested; *Nihal Chand* v. *Azmat Ali Khan*(14).

Ross, for the respondents, contended that the appellants had not made out any right to succeed in their suit. Both the Courts below had concurred in finding that the village of Tiruvendipuram never at any time belonged exclusively to the Vadagalais. Nor had they established any such custom as they had set up which

(1) I.L.R., 7 Bom., 323.
(2) 3 M.H.C., 226 at p. 229.
(3) (1809), 16 Ves., 321.
(4) (1873), L.R., 8 C.P., 527.
(5) (1904), A.C., 64.
(6) (1891), A.C., 228 at p. 231.
(7) (1838), 9 A. &. E., 406.
(8) I.L.R., 26 Mad., 104.
(9) (1867), 1 H.L. Sc. Ap., 117.
(10) (1876), L.R., 3 Ch.D., 610.
(11) I.L.R., 5 Mad., 304.
(12) I.L.R., 25 Mad., 635.
(13) (1896), A.C., 434.
(14) I.L.R., 7 All., 362.

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SADAGOPA CHARIAR v. KRISHNAMOORTHY RAO.

gave them the right to prevent the respondents from using the public streets for processions for the worship of their own idol. Such a custom, even if proved, would be an unreasonable one and not enforceable at law, as had been held by both the lower Courts. The High Court said they had "not been referred to a single reported case in which such a right of one sect to interdict a rival sect from the use of the public streets has been recognized by the superior Courts in India." The decrees on which the appellants relied as deciding the matters in issue had been rightly held by both Courts below not to operate as *res judicata*; the parties to them did not represent the rival sects; the relief asked for and given was different from that now sought; and the basis on which the former suits were brought and decided was not the same as that on which the present suit was brought. The respondents, therefore, it was submitted, had the right to use the streets of the village in a lawful manner without being restrained, as the appellants sought to restrain them, in the exercise of their rightful privileges.

DeGruyther replied.

1907, *March* 21*st*.—The judgment of their Lordships was delivered by

Lord MACNAGHTEN.—This is an appeal from a judgment and decree of the High Court at Madras affirming the decision of the District Judge of South Arcot which dismissed the appellants' suit with costs.

The High Court refused leave to appeal on the ground that the matter in dispute was below the appealable value. Special leave, however, was granted on the representation that the appeal raised questions of law of general importance touching the rights of religious bodies in India in regard to public processions, and the right of one religious body to prevent a rival sect and an alien deity from invading precincts apparently public, but devoted or appropriated from time immemorial to the observance of its own peculiar ritual and worship; and at the same time involved the consideration of the effect of previous decisions on similar questions between members of different sects of one and the same community.

The suit was the outcome of a long-standing feud between Vadagalais and Tengalais—two sects of Vaishnava Brahmins residing in the village of Tiruvendipuram in the district of South Arcot. The village contains an ancient Vaishnava temple

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dedicated to Devanayaka Swami. Annexed to it is the shrine of a saint named Vedanta Desika, who is held in great veneration by the Vadagalais. The Tengalais, on the other hand, worship a saint said to belong to more modern times and called Manavala Mahamuni. In 1807 a number of Tengalais sued a number of Vadagalais for damages for having prevented them from placing an image of their saint in the temple. The suit was dismissed, and the idol which the Tengalais had set up was removed by order of the Court. In 1828 the Tengalais set up an image of their saint in a private house and began to hold processions through the streets in its honour. Then a number of the Vadagalais brought a suit against a number of the Tengalais complaining of their having publicly worshipped the saint and carried the idol in procession through the streets. The Vadagalais alleged that the streets traversed by the procession were attached to the temple, and that the worship of the Tengalai saint was contrary to established custom and usage. Questions were then addressed to the Hindu Pundits. In accordance with their opinion, which seems to have been based not so much on legal grounds as on precepts relating to ritual and ceremonial observances to be found in ancient treatises on such subjects, the Court ordered that the service which the Tengalais had established should be discontinued, and awarded damages to the plaintiffs. On appeal to the Court of Sadr Adalat the decree was varied to the extent of permitting worship of the Tengalai idol in private houses, while public processions in its honour were prohibited as unauthorized innovations. The feud continued. There was further litigation, and there were divers proceedings before the Magistrate with varying success until, in 1886, the then Magistrate refused to prohibit the public worship of the Tengalai idol and referred the Vadagalais to the Civil Court. The Vadagalais then moved to enforce the order of the Sadr Adalat by arrest and imprisonment of certain persons who were descendants of some of the defendants in the suit of 1828. The petition was dismissed, and at last the Vadagalais brought the present suit asking for a declaration of their right to prohibit the public worship of the Tengalai idol and processions in its honour, and praying for an injunction accordingly. They based their claim to relief on the allegation that the Vadagalais were originally the owners of all the land in the village, and only allowed houses to be built and streets formed subject to the reservation that

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SADAGOPA CHARIAR v. KRISHNAMOORTHY RAO.

no worship or procession of a Tengalai idol should be permitted there. They contended that, even if strict proof of that allegation were wanting, a conditional or limited dedication of the streets to the public should be presumed, and that at any rate they had acquired, by immemorial usage and custom, the right to prevent the worship and processions of any alien deity in their streets. Lastly, they submitted that, so far as Manavala Mahamuni was concerned, the rights of the parties were concluded by the decision in the suit of 1828, and that the matter to that extent was *res judicata.*

Both Courts have decided against the plaintiffs. It seems to their Lordships that the decision is perfectly right. There is no trace of any evidence tending to show that the site of the village was at any time the private property of the Vadagalais. The village is an ordinary ryotwari village. The streets are public streets now vested under the Madras Act No. V of 1884 in the Local Board. All members of the public have equal rights in them. If the Vadagalais had any valid objection to the streets of the village being vested in the Local Board, they had the opportunity of raising the objection by appeal to the Governor-General in accordance with the provisions of the Act. Even if they had had any such rights as they claim in the present suit at the time when the Act of 1884 came into force in the village of Tiruvendipuram, it would be much too late for them to set up such a claim now.

The plea of *res judicata* is equally untenable. The suit of 1828 was not a representative suit binding property, or even designed or framed for the purpose of binding for all time the Tengalai community, if there is any body that can be so described, and if such a suit were competent. It was a suit against certain persons alleged to be wrong-doers in their individual capacity.

The result is that the suit completely fails, and their Lordships may observe that it does not seem to involve such far-reaching issues as were put forward in the petition asking for special leave to appeal.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: *Lawford, Waterhouse & Lawford.*
Solicitor for the respondents: *Douglas Grant.*

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

APPACOOTY MUDALI AND OTHERS (PLAINTIFFS), APPELLANTS, 1906. October 23, 24. November 7.

v.

MUTHU KUMARAPPA MUDALI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Probate—Executor according to the tenor—Probate to executor according to the tenor granted only where discharge of such duties as executors have to perform are included.

Where property is left by a will to trustees, they will not be entitled to probate as executors according to the tenor, unless it appears from the will that they have to discharge such duties as executors have to perform.

THIS case is reported solely on the question of granting probate to executors according to the tenor.

This was an application for probate of the last will and testament of the deceased Muruga Paradesi by plaintiffs as executors by implication.

The defendants entered a caveat and the application for probate was dismissed by Boddam, J.

Plaintiffs appealed.

The Hon. Mr. *P. S. Sivasawmi Ayyar* for *V. Krishnaswami Ayyar* and *S. Srinivasa Ayyar* for appellants.

P. R. Sundara Ayyar and *K. S. Ramaaswmi Sastri* for respondents.

JUDGMENT.—As regards the question whether probate of the will should be granted to the petitioners as executors according to the tenor, we are of opinion that they are not entitled to be treated as executors in that sense. The definition of an executor in the Probate and Administration Act, on which Mr. Sivaswami Ayyar laid stress merely follows the language used by Blackstone, and cannot be held to warrant an interpretation different from that adopted by a long course of authorities in England and followed here in the decisions to which our attention was drawn on behalf of the caveators by Mr. Sundara Ayyar.

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* Original Side Appeal No. 10 of 1906, presented against judgment of Mr. Justice Boddam, dated the 15th December 1905, in the ordinary original civil jurisdiction of the High Court in T.O.S. No. 1 of 1905.

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Appacooty Mudali v. Muthu Kumarappa Mudali.

No doubt, the mere circumstance that the property is left by the will to trustees without words referring to them as executors would not prevent those persons being granted probate as executors according to the tenor, if, among the duties to be discharged by them under the will, there are included such duties as executors have to perform. But that should appear from the will. *In re Hamilton*(1) strongly relied on by Mr. Sivaswami Ayyar is itself a decision supporting this view. No doubt there, though the trustees were not expressly appointed as executors, they were held to be executors according to the tenor. But Warren, J., in so holding, relied upon the words in the will "First, to manage the "same as they may think best for those interested," and went on to observe: "To manage the property they must realize it, and "that involves the payment and collection of debts before the "surplus can be ascertained, and disposed of as directed by the "will. For that purpose the legatees must have the rights and "duties of executors." We may also refer to *In the goods of Punchard*(2) and *In the goods of Lowry*(3). Turning now to the provisions of the will here, they seem to be strictly confined to the petitioners as well as Gnanammal acting, respectively, as trustees of the two sets of properties. The language gives them no power whatsoever to do any of the duties necessarily appertaining to the office of executor. They cannot, therefore, be treated as executors according to the tenor.

We accordingly dismiss the appeal without costs on the ground that the petitioners are not entitled to probate.

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(1) 17 L.R. Ir., p. 277. (2) (1872) L.R., 2 P. & D., 369.
(3) L.R., 3 P. & D., 157.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

1906. September 12, 14.

PULABAIYAGARI MUNISAMY CHETTY AND OTHERS (CLAIMANT AND HIS LEGAL REPRESENTATIVES), APPELLANTS,

v.

THE RAJAH OF KARVETNAGAR (COUNTER-PETITIONER), RESPONDENT.*

Madras Regulation V of 1804 (*as amended by Act IV of* 1899), *s.* 35—*Rules* 7, 9 *of rules framed under s.* 35—*Procedure when Government rescinds notification after reference to Civil Court.*

Where the Collector, to whom a decree has been transferred for execution by virtue of a Notification by Government under section 35 of the Amended Regulation V of 1804, makes a reference to the Civil Court under Rule 7 of the rules framed under the section and the Civil Court passes a decision in such reference and pending an appeal to the High Court against such decision, the Government rescinds the notification:

Held, that the proper course to be adopted by the High Court was to set aside the decision of the lower Court, without prejudice to the parties raising the question involved in the reference in execution proceedings in the Civil Courts.

PLAINTIFF, claimant, obtained a decree in Original Suit No. 22 of 1893 which was a suit on a mortgage bond. In execution of the decree the mortgaged property was sold but was insufficient to satisfy the whole amount of the decree. The plaintiff then asked for the attachment of other property of the defendant and obtained an order. Plaintiff again applied for the attachment of other properties and property was attached. At this stage the decree was transferred for execution to the Decree Collector who dismissed the claim on the ground that it was barred.

A reference was made to the District Court under Rule 7 of rules made under section 35 of Regulation V of 1804 and the District Court passed a decision against which an appeal was preferred to the High Court.

Further facts appear in the judgment.

P. R. Sundara Ayyar for second and third appellants.

V. Krishnaswami Ayyar for respondent.

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* Appeal No. 150 of 1903, presented against the order of Manavedan Rajah, Esq., District Judge of North Arcot, in Referred Case No. 4 of 1902.

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PULA-BAIYAGARI MUNISAMY CHETTY v. THE RAJAH OF KARVETNAGAR.

JUDGMENT.—Since the District Judge's decision the Government has by its notification rescinded its order providing for the transfer of execution of decrees to the Collector.

The effect of this is to put an end to all further execution by the Collector, by virtue of the transfer under the order.

The reference to the District Judge in cases of dispute is intended to enable the Collector to prepare a register of persons entitled to execution and of the sums payable to them. The rules provide that the decision of the Court shall be communicated to the Collector in order that entries may be made in his register in accordance with such decision. There is nothing in the rules to show what is the effect of the register so prepared, once the Collector's proceedings in execution are put an end to by the rescission of the order of Government. Any decision that we may pass could not be communicated to the Collector who by the rescission is *functus officio*.

As suggested by Mr. Krishnaswami Ayyar, had the rescission taken place while the matter was pending before the District Judge the proper order for him to have made would have been to decline to give any decision, leaving the dispute to be settled by the appropriate process. This Court, dealing with the matter in appeal, should, it seems to us, adopt the same course.

As, however, the order of the District Judge unless set aside operates under the rules as a decree, we set it aside without prejudice to the parties raising, in execution of the decree in the Civil Courts, the question whether the decree can or cannot be executed against property other than the mortgaged property.

We make no order as to costs.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

PUTTANNA *alias* KESHAVA BHATTA (PLAINTIFF), APPELLANT, 1906. November 28.

v.

RAMAKRISHNA SASTRI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Specific Relief Act I of 1877, *s.* 42—*Presumptive reversioner, entitled after widow's death, may sue to set aside will of last male holder.*

The right of the presumptive reversioner to sue for a declaratory decree under section 42 of the Specific Relief Act is not restricted to the class of transactions referred to in Illustrations (*e*) and (*f*) to that section, *i.e.*, to transactions by the widow herself.

Where on the death of the last male owner, leaving a widow, the properties belonging to him, are claimed by devisees under a will alleged to have been left by him, the nearest reversioner in existence is entitled to sue for a declaration that the alleged will was invalid and did not bind his reversionary interest.

A, died issueless, leaving behind him his widow the fourth defendant. By his last will and testament he bequeathed his properties to defendants Nos. 1 and 2. The plaintiff, as the presumptive reversioner, sued for a declaration that the will of *A* was invalid having been obtained by fraud and undue influence and that he, equally with the third defendant, was entitled to succeed to the properties on the death of the fourth defendant. The fifth issue was as to whether the suit for a declaration was sustainable. That portion of the judgment dealing with this issue was as follows:—

"The present suit is by a reversioner, the plaintiff, for a declaration that the will said to have been obtained by defendants Nos. 1 and 2 from one Anantha Bhatta in their favour is null and void and that the plaintiff equally with the third defendant is entitled to succeed to the plaint property belonging to Anantha Bhatta after the death of fourth defendant, the widow of the said Anantha Bhatta. The plaint does not so much as allege any complicity or collusion of the fourth defendant in getting up the will impeached, nor is it in any way made out that the fourth

* Appeal No. 88 of 1904, presented against the decree of M.R.Ry. S. Raghunathaiya, Subordinate Judge of South Canara, dated 23rd February 1904, in Original Suit No. 113 of 1903.

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PUTTANNA *alias* KESHAVA BHATTA *v.* RAMA-KRISHNA SASTRI.

defendant has precluded herself by her own act or conduct from impeaching the will. So far from acquiescing in the will fourth defendant appears to have impeached it when maintenance was sent to her, as under the will, by a money order on 12th August last, and accepted what was sent only as a portion of the income of her husband's property (*vide* 1 and the evidence of the second defendant). So the suit is virtually for a declaration that the plaintiff is entitled to succeed to the estate of the deceased Anantha Bhatta on the death of the fourth defendant. But it is clear law that during the lifetime of the fourth defendant, the heiress, no one can bring such a suit, because, as his title must depend upon the state of things at her death a suit before that time would be an unnecessary and useless litigation of a question which may never arise or may only arise in a different form. (*Vide* Mayne's 'Hindu Law and Usage,' 4th edition, paragraph 601.) I hold that the present suit for declaration is unsustainable."

The Subordinate Judge dismissed the suit.

The plaintiff appealed.

C. V. Anantakrishna Ayyar and *B. Sitarama Rau* for appellant.

K. S. Ramaswami Sastri for *K. P. Madhava Rau* for first and second respondents.

JUDGMENT.—We are unable to agree with Subordinate Judge that the plaintiff's suit is unsustainable. In the absence of any valid will by the late Anantha Bhatta, the plaintiff would be entitled, as reversioner, to succeed to his estate on the death of his widow (the fourth defendant). But the defendants Nos. 1 and 2 have put forward a will alleged to have been made by Anantha Bhatta under which they are entitled to the property. The plaintiff alleges that this will was made under undue influence and coercion, and is therefore invalid as against his reversionary interest, and he sues for a declaration to this effect. The Subordinate Judge has dismissed the suit on the ground that in the absence of a will the widow would take the estate for her life and that as she may survive longer than the plaintiff the suit is premature and involves litigation which may eventually prove to have been unnecessary.

He has, however, overlooked the provisions of section 42 of the Specific Relief Act under which the plaintiff as the presumptive reversioner is entitled to maintain a declaratory suit in circumstances such as the present.

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The argument of the vakil for the respondent that the enacting portion of that section should be confined to the case of transactions by a widow as in Illustrations (*e*) and (*f*) to the section, is, on the face of it, untenable; nor can it be held that the plaintiff was bound to show collusion, acquiescence or laches on the part of the fourth defendant before he is allowed to institute the suit. The well-known decision of the Privy Council in *Rani Anand Kunwar* v. *The Court of Wards*(1) has no application to the present case, which is a suit by the presumptive reversioner.

We therefore set aside the decree and remand the suit to the District Judge for disposal according to law.

Costs will abide and follow the result.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1906. April 27. October 16.

DURGOZI ROW AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

FAKEER SAHIB AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 3 TO 6), RESPONDENTS.*

Muhammadan Law—*De facto guardian, power of, over minor's property*—*Transfer of Property Act, IV of* 1882, *s.* 51—*Equitable principle embodied in s.* 51 *not opposed to Muhammadan Law.*

Under Muhammadan Law, a sale by the mother, as *de facto* guardian of her minor son, of the property of such minor is not binding on him.

The rule of equity embodied in section 51 of the Transfer of Property Act is not opposed to any principle of Muhammadan Law and section 2 does not preclude its application in cases decided under the Muhammadan Law.

What constitutes good faith within the meaning of section 51 is a question of fact and a person may act in good faith, though he acts under a mistake of law.

THE plaintiff, a Muhmamadan, sued to recover from defendants Nos. 1 and 2, a house sold by his mother and *de facto* guardian,

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(1) I.L.R., 6 Calc., 764.

* Second Appeal No. 1087 of 1903, presented against the decree of M. Ghose, Esq., District Judge of Cuddapah, in Appeal Suit No. 14 of 1903, presented against the decree of M.R.Ry. T. Gopalakrishna Pillai, District Munsif of Cuddapah, in Original Suit No. 614 of 1902.

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DURGOZI ROW v. FAKEER SAHIB.

during his minority to defendants Nos. 1 and 2. The defendants contended that the plaintiff was not solely entitled to the house as his sisters were entitled to shares; that the sale to them was binding on plaintiff; and that the plaintiff could not recover the house without paying the value of the improvements effected by the defendants Nos. 1 and 2. The other sharers were joined as defendants Nos. 3 and 6. The District Munsif dismissed the suit. In appeal, the District Judge held that the sale was not binding on plaintiff, that the defendants Nos. 1 and 2 were not entitled to the value of the improvements effected by them, and reversing the Munsif's decree, gave the plaintiff a decree for the whole house and Rs. 50 mesne profits. First and second defendants appealed.

The main grounds of appeal were—

(1) That the decree of the lower Appellate Court awarding the whole of the property to the plaintiff who was entitled by law only to a fraction thereof was irregular and unsustainable.

(2) That the Court below ought to have held that a mother, under the Muhammadan Law, was the proper guardian of the person and property of her minor son.

(3) That the Court below erred in holding that section 51 of the Transfer of Property Act did not apply to the case and that the defendants were precluded from recovering the value of improvements by any rule of Muhammadan law or otherwise.

C. Ramachandra Row Sahib for appellants.

The Hon. Mr. *P. S. Sivaswami Ayyar* for first respondent.

T. Ethiraja Mudaliar for second, third, fifth and sixth respondents.

JUDGMENT.—The sale by the mother though made by her as *de facto* guardian of the minor, the parties being Muhammadans, is not binding on the minor (see *Pathummabi* v. *Vittil Ummachabi*(1), *Moyna Bibi* v. *Banku Behari Biswas*(2), and *Baba* v. *Shivappa*(3)).

We cannot adopt the view of the District Judge that section 51 of the Transfer of Property Act does not apply on the ground that chapter II of the Act is not to be deemed to affect any rule of Muhammadan law. There is no rule of Muhammadan law which would preclude the defendants from claiming the benefit of the

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(1) I.L.R., 26 Mad., 734. (2) I.L.R., 29 Calc., 473.
(3) I.L.R., 20 Bom., 199.

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principle of equity embodied in section 51 of the Transfer of Property Act. Neither can we accept the contention urged by Mr. Sivaswami Aiyar on behalf of the first respondent that a party who acts under a mistake of law cannot be said to act in good faith within the meaning of the section. The question whether a transferor of immoveable property believes in good faith that he is absolutely entitled thereto is a question of fact.

As the plaintiff sues as heir of his father he is only entitled as a sharer, together with the other members of the family unless the shares of the other members of the family have become vested in him.

The case must go back to the lower Appellate Court for a finding as to whether the shares of any and which of the other members of the family have become vested in the plaintiff, and also for a finding as to whether the defendants believed in good faith that they were absolutely entitled to the property in question, and, if so, as to what sum (if any) the defendants are entitled to receive.

The findings should be submitted within one month from the re-opening of the High Court. Seven days will be allowed for filing objections.

In compliance with the above judgment, the District Judge submitted the following

FINDINGS—" *Issue I.*—' Whether the shares of any and, if so, which of the other members have become vested in the plaintiff.' The only evidence put forward on behalf of the plaintiff is that of his first witness. The alleged disposition of property is not supported by any document and I am of opinion that it is not proved that the shares of any of the other members have become vested in the plaintiff. It is for the plaintiff to prove his ownership and it is idle to urge that the plaintiff's relatives do not claim a share.

Issue II.—' Whether the defendants believed in good faith that they were absolutely entitled to the property in question.' The price paid for the house was Rs. 300, the money having been paid before the Sub-Registrar. The evidence of the plaintiff's first witness is to the effect that the building used to fetch a rent of Rs. 2. The plaintiff's second witness who occupied the house paid rents varying from Re. 1 to Rs. 2. The price paid for the house was therefore adequate. There is also abundance of evidence

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to show that improvements have been effected in the house. conduct of the first and second defendants appears to me to clearly that they believed in good faith that they were abs owners of the property.

Issue III.—'What sum if any the defendants are entitled receive.' The District Munsif has given good reasons for sup posing that Rs. 400 were spent in improving the property. Th support that the plaintiff's sixth witness gives to the defend evidence on the point appears to me to strengthen the defendant case greatly. It is urged before me that the evidence on th point should not be relied on as no accounts have been produced The first and second defendants however if they imagine themselves absolute owners probably considered it unnecessary keep accounts. I therefore find that Rs. 400 were spent in makin improvements. If the plaintiff gets the house he should pay th amount to the first and second defendants. If he only gets share of the house, he should pay a proportionate fraction."

This second appeal coming on for final hearing this day aft the return of the said finding, the Court delivered the following

JUDGMENT.—On findings, which we accept, the decree of th lower Appellate Court will be modified as follows:—

The plaintiff will be declared entitled to $\frac{5}{18}$ of the house i question, and Rs. 14-9-4 for mesne profits.

Plaintiff will pay Rs. 116-10-8 for improvements a condition of obtaining possession. Each party will pay and receiv proportionate costs throughout.

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APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Wallis.

DHOORJETI SUBBAYYA (PLAINTIFF), APPELLANT,

1906.
December
18, 21.

v.

DHOORJETI VENKAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act, XV of 1877, sched. II, art. 127—Time does not run until sharer excluded—Transfer of Property Act, IV of 1882, s. 6 (a)—Hindu Law, reversioner—Renunciation of reversionary right is a transfer of an expectancy and as such is void.

A, a member of an undivided Hindu family, was adopted by one V, a widow. His adoption was declared invalid in 1883. He consented to reside with V, and in 1896 orally renounced his right to a share in the property belonging to his natural family in consideration of his co-sharers who were also the reversioners of V renouncing the reversionary right in the properties held by V as the heiress of her husband. In a suit brought by A in 1901 for partition of the property in his natural family:

Held, that A's residing with V from 1883 to 1896 did not amount to an abandonment by A of his right to partition or to an exclusion of A to his knowledge, from the enjoyment of his family property and that his right to partition was not barred by article 127, schedule II of the Limitation Act;

Held further, that the renunciation of their reversionary rights by the reversioners amounted to a transfer of an expectancy and was a nullity under section 6 (*a*) of the Transfer of Property Act, and that such renunciation cannot be a good consideration for a contract.

SUIT for partition.

The first defendant and his sons, the plaintiff and defendants Nos. 2 and 3, are members of a joint family. The plaintiff was given in adoption to V, the widow of S. The adoption was declared invalid at the suit of the then reversionary heirs of S in 1883. The plaintiff continued to live with V, and in 1896, the defendants who were then the presumptive reversioners of S executed a release of their reversionary right to the plaintiff who orally renounced his right to a share in the family properties. Subsequently, the plaintiff and V quarrelled and the plaintiff brought this suit for partition.

* Second Appeal No. 855 of 1904, presented against the decree of T. M. Swaminatha Ayyar, Esq., District Judge of Nellore, in Appeal Suit No. 161 of 1903, presented against the decree of M.R.Ry. N. R. Narasimmiah, District Munsif of Nellore, in Original Suit No. 474 of 1904.

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The Munsif held, on the question of limitation under the second issue that defendants were in adverse possession from 1883 and he also found that the plaintiff had validly relinquished his right in consideration of the release by the defendants. He dismissed the plaintiff's suit. The District Judge confirmed the decision on appeal.

The plaintiff appealed to the High Court.

Dr. *S. Swaminadhan* for appellant.

A. Nilakanta Ayyar for *V. Krishnaswami Ayyar* for respondents.

JUDGMENT.—The plaintiff sues for his share of the property of his family. He was adopted when a child by the widow of one Sundararamayya, but in 1883 his adoption was declared invalid. He continued to reside with Sundararamayya's widow and in 1896 orally renounced his rights to share in the property of his natural family in consideration of a relinquishment by the reversionary heirs of Sundararamayya of their rights to succeed to his estate on the death of his widow. There are two defences to the suit (1) the renunciation and (2) limitation.

There is no distinct finding by either Court below, on the second point. Article 127 of the second schedule of the Limitation Act is relied on for the respondents; the District Judge does not deal with this question; and the District Munsif, though he finds issue No. 2 for the defendants, does not consider the question of the exclusion of the plaintiff to his knowledge from enjoyment of the property of his natural family. What is found is only that the plaintiff continued even after the invalidation of his adoption to live with Sundararamayya's widow and perform the sradha ceremonies of her husband. There is nothing to indicate that he abandoned before 1896 his claims to enjoy his family property or that the defendants to his knowledge excluded him from enjoyment. He did not ask for a share before that, merely because he did not require it. Article 127 is therefore no bar to this suit.

The oral renunciation assuming it to be valid under any circumstances is in our opinion without consideration. The alleged consideration is exhibit A, but that is a nullity by virtue of section 6 (*a*) of the Transfer of Property Act (compare *Nund Kishore Lal* v. *Kanee Ram Tewary*(1)). It was contended that it does not effect a transfer of an expectancy of the defendants, but merely binds

(1) I.L.R., 29 Calc., 355.

them not to assert their reversionary rights against the plaintiff; the instrument however declares that they and their heirs shall cease to have any concern with the property, and so clearly was intended to effect a transfer.

We allow the appeal and direct the District Judge to effect the partition of the plaintiff's share after deciding the question raised in the fourth issue.

The costs of this appeal must be paid by the respondents. Costs in the lower Appellate Court can be provided for by the District Judge in his final decree.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1906. November 1, 2, 5. December 20.

MANA VIKRAMA, ZAMORIN OF CALICUT (SECOND DEFENDANT), APPELLANT,

v.

KARNAVAN GOPALAN NAIR (PLAINTIFF'S REPRESENTATIVE), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *ss.* 13, 562—*Decision disallowing permanent tenure, no* res judicata *in a subsequent suit to receive allowance—Adimayavana, nature of—Grant of allowance, presumption of—No remand when suit not determined on a preliminary point.*

Suit by A to recover *Adimayavana allowance* from B. In a previous suit by B against A for redeeming land, A had set up an irredeemable *Adimayavana tenure* in the land, which contention was overruled and a decree for redemption was made. The Court of first instance held that the suit was barred by *res judicata* that the right to Adimayavana allowance was not proved and dismissed the suit. The lower Appellate Court reversed the judgment on both the points and remanded the suit for re-trial.

Held by the High Court on appeal that the decision in the previous suit disallowing the *tenure* was no bar under section 13 of the Code of Civil Procedure to the present suit for the *allowance*.

The word *Adimayavana* when applied to a tenure of land, imports a permanent tenure, but it may be used with reference to an allowance of money or grain rent charged on the land, and in that case it will not imply any tenure in favour of the grantee, but only an allowance.

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* Civil Miscellaneous Appeal No. 181 of 1905, presented against the order of M.R.Ry. S. Raghunathaiya, Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 206 of 1905, presented against the decree of M.R.Ry. M. Subbaiyar, District Munsif of Alatur, in Original Suit No. 82 of 1903.

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The fact that an allowance had been received out of certain lands for a long period from several successive owners, is proof of a grant of perpetual allowance charged on such land.

Vythilingam Pillay v. *Kuthirevatath Nair*, (I.L.R., 29 Mad., 501), referred to and followed.

Held further, that the decision of the Munsif on the right of the plaintiff to the perpetual allowance was not a decision on a preliminary point and the lower Appellate Court ought not to have remanded the suit under section 562 of the Code of Civil Procedure.

SUIT by plaintiff to recover *Adimayavana* allowance for two years from defendant. Defendant had sued plaintiff to redeem certain lands held by plaintiff on kanom, and plaintiff in that suit pleaded that he had an irredeemable Adimayavana tenure in the lands. His contention was disallowed on second appeal and a decree for redemption passed in favor of the defendant. Defendant having redeemed the lands plaintiff brought this suit for the allowance.

Defendant contended, *inter alia*, that the plaintiff's claim was *res judicata* by reason of the decision in the previous suit and plaintiff had no right to any such allowance.

Plaintiff's suit was dismissed by the Court of first instance, which found against the plaintiff on both the points. The lower Appellate Court reversed the decree on both the points and remanded the suit for retrial.

Second defendant appealed.

T. R. Krishnasawmi Ayyar for *T. R. Ramachandra Ayyar* for appellant.

V. Purushotama Ayyar for the Hon. Mr. *P. S. Sivaswami Ayyar* for respondent.

JUDGMENT (BENSON, J.).—I am of opinion that the decision of the Subordinate Judge on the two questions discussed by him is correct.

The suit is not *res judicata* by reason of the decree of the High Court (exhibit N) in Second Appeal No. 602 of 1898 or otherwise. That suit was a suit to redeem the land. The defence was that it was held on a perpetual tenure and could not be redeemed. The decision was that the documents relied on by the defence did not evidence a perpetual tenure. The words "there are no words indicating perpetuity," when read with the preceding sentence, show that the Court was referring to perpetuity of *tenure*.

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That decision must be accepted as between the parties, but the present suit is not with regard to the possession of the land, but is "for the recovery of the Adimayavana allowance" referred to in exhibits D and E. The nature of this allowance has been fully dealt with by this Court in the recent case of *Vythilingam Pillay* v. *Kuthiravattah Nair*(1). Referring to the case of *Theyyan Nair* v. *Zamorin of Calicut*(2) the Court said "In that case the words of the document were 'The rent of "'29 items is 160 paras of paddy, being the rent due exclusive of "'allowance for *Adima Yavana* as heretofore.'" The Court there explained that *Adima* meant a 'servant' and *Yavana* 'enjoyment,' the whole expression implying an allowance given for service, and it added that there was judicial authority for holding that when it applied to a tenure of land it *primâ facie* imported a permanent tenure just as *Anubhavam* implied a permanent tenure. It further pointed out that in that case there were reasons why the grant must be held to have been made for services already rendered and that the amount of the grant, not being specified, must be the produce of the land after deducting the rent settled as reserved for the landlord. The Court therefore held that the instrument created an irredeemable tenure in favour of the grantee. That conclusion is, we think, obviously correct. The grantor reserved a rent of 160 paras of paddy for himself and it had been paid without alteration from time immemorial. He granted the rest of the produce as a permanent allowance for the services rendered. That is just the converse of the present case, where the allowance in favour of the grantee is fixed at so many paras of paddy and the land is held on kanom tenure, implying the right to redeem the land after twelve years, or to renew the kanom with a readjustment of the rent. The point to be borne in mind with regard to '*Anubhavam*' is that it may be used with reference to tenure of land, and it will then *primâ facie* import an irredeemable tenure, or it may be used with reference to a specified money or grain rent charged on the land, and in that case it will not imply any tenure in favour of the grantee. But if the amount of the grant is not specified and if the terms of the document indicate that only a fixed rent is reserved from the grantor and the rest of the produce is given as '*Anubhavam*' or 'Yavana,' then it may well be that the Court

(1) I.L.R., 29 Mad., 501. (2) I.L.R., 27 Mad., 202.

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will treat it as creating an irredeemable tenure, so as to secure to the grantee the benefits intended for him by the grant.

"In the present case, we hold that no irredeemable tenure was created, but that defendants Nos. 2 and 3 are still entitled to recover 5 paras of paddy annually from the land if the plaintiff redeems the kanom."

I think that these observations apply exactly to the present case and that exhibits E and D coupled with the fact that the allowance has been enjoyed for more than three-quarters of a century, and has been received during all that time out of the land specified in those documents, with the acquiescence of the successive stanis zamorins justifies the conclusion that there was a valid grant of the allowance in perpetuity as a reward for services rendered, and that it was charged on the lands specified in those documents. The present zamorin having recovered possession of the lands from the plaintiff's tarward is liable to pay the allowance, and it is necessary that the amount should be determined. But the Subordinate Judge was in error in remanding the suit to the District Munsif. The fourth issue determined by the Courts below was in no sense a preliminary issue within the meaning of section 562, Civil Procedure Code. It dealt with an integral and vital part of the merits of the plaintiff's suit. The proper course, therefore, was for the Subordinate Judge to have called upon the District Munsif to return findings on such of the other issues in the case as were necessary, and to have then himself decided the suit.

I would therefore set aside the order of the Subordinate Judge remanding the suit, and direct him to restore the appeal to his file and dispose of it according to law.

Costs in this Court will abide the event.

WALLIS, J.—I agree with my learned brother that there is no ground for interfering with the finding of the lower Appellate Court on the fourth issue in favour of the plaintiff. The case must accordingly go back in order that the other issues may be disposed of.

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APPELLATE CIVIL.

Before Mr. Justice Miller.

KARUPPAN CHETTI AND ANOTHER (PLAINTIFFS NOS. 1 AND 2 AND LEGAL REPRESENTATIVES OF THE FIRST PLAINTIFFS), PETITIONERS,

1906. October 26, 30.

v.

KANDASAMI THEVAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Attachment, effect of—Attaching creditor has no cause of action for wrongful removal of attached property—Such creditor's remedy, if any, lies in execution and not by separate suit—S. 91 (f) of Transfer of Property Act not applicable to attaching creditors.

An execution creditor does not by attachment, acquire such an interest in the attached property as will enable him to maintain an action for its wrongful removal.

The rights of attaching creditors are regulated by the Code of Civil Procedure and the provisions of section 91 (*f*) of the Transfer of Property Act do not apply to them.

The remedy, if any, of the attaching creditor is by proceedings in execution and not by separate suit.

Godu Ram v. *Suraj Mal.*, (I.L.R., 27 All., 378), doubted.

THE facts as stated in the judgment of the lower Court were as follows :—

Plaintiffs obtained a decree in Original Suit No. 22 of 1903 on the file of this Court and attached the standing produce on certain lands belonging to their judgment-debtors. The present first defendant (the undivided father of the defendants Nos. 2 to 4) put in a claim to the standing produce on the strength of a lease of the lands, but his claim was disallowed. It is alleged now by the plaintiffs that the first defendant has, subsequently, under colour of his fraudulent lease, cut and carried away the standing crops. The plaintiffs as attaching creditors claim the value of the produce as damages from the defendants for their alleged *tortious* act.

At the trial, the defendants took an objection not mentioned in their written statement, *i.e.*, that plaintiffs have no *locus*

* Civil Revision Petition No. 236 of 1905, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of M.R.Ry. V. Swaminatha Ayyar, Subordinate Judge of Madura (West), in Small Cause Suit No. 228 of 1905.

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standi to maintain this suit on the ground that they acquired no title to or interest in the standing crops by virtue of their attachment.

I think this legal objection must prevail. It has been held in a series of cases that attachment under the present Code of Civil Procedure creates no title, but only restrains alienation—*Moti Lal* v. *Karrabuldin*(1) *vide Lachmi Dayal* v. *Hari Danni Lal*(2) and *Kristnasawmy Mudaliar* v. *Official Assignee of Madras*(3).

Holding, therefore, that plaintiffs have acquired no interest in the crops by virtue of their attachment, I dismiss the suit, but in the circumstances, the parties shall bear their own costs.

Against this judgment plaintiffs put in revision petition under section 25 of Act IX of 1887.

C. V. Anantakrishna Ayyar for *S. Srinivasa Ayyangar* for petitioner.

The Hon. Sir *V. C. Desikachariar* for respondents.

JUDGMENT.—The plea raised before me that the respondents are not entitled to oppose the petition, because they alleged in the Court below that a suit and not execution was the proper remedy of the judgment-creditor, fails for the reasons (1) that it was not made a ground of appeal in the petition and (2) that there is nothing in the order of the Court below or in the "counter-petition" of Kandasami Tevan, dated the 6th October 1904, to suggest that the Court in referring the plaintiffs to a suit was acting at the instance of the first counter-petitioner.

I must take the facts to be those alleged by the plaintiffs, that is to say, that standing crops belonging to their debtors and attached by them were, while under attachment, wrongfully carried away by Kandasami Tevan.

The question for decision is "Can the plaintiffs on those facts sue Kandasami Tevan for the value of the crops?" But for the attachment he clearly could not do so, but it is contended that the effect of the attachment is to vest in the attaching creditor an interest in the property attached, which in effect makes its wrongful removal a wrong done to him.

It is, however, difficult to see in what respect a judgment-creditor has after attachment a greater interest to protect his

(1) I.L.R., 25 Calc., 179. (2) I.L.R., 25 All., 347 at p. 350.
(3) I.L.R., 26 Mad., 673.

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judgment-debtor's property from wrong doers than he had before the attachment.

For the appellant section 91 (*f*) of the Transfer of Property Act is referred to: but the right there given is not one given to attaching judgment-creditors by the Code of Civil Procedure, the law which regulates their rights, else it would not have been necessary to give it by the other statute (cf. *Soobhul Chunder Paul* v. *Nitye Churn Bysack*(1)). That provision is therefore rather against than in favour of the appellant.

It is true that in *Godu Ram* v. *Suraj Mal*(2) it was suggested, though it was not decided, that there might be in the attaching creditor a right of suit against persons who had wrongfully removed the judgment-debtor's property from the custody of the Court, but I confess I am unable to see on what that right can be based. That case is, however, authority for the view that the Court can interfere without a suit, and it seems to me that the petitioners' remedy was to move the Court executing the decree to do so.

I dismiss the petition with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1906. November 20. December 6.

RAMINEEDI VENKATA APPA RAO (PETITIONER-PLAINTIFF), APPELLANT,

v.

LAKKOJU CHINA AYYANNA AND OTHERS (COUNTER-PETITIONERS—DEFENDANTS, NOS. 1 TO 4), RESPONDENTS.*

Limitation Act, Act XV of 1877, sched. II, arts. 178, 179—Article 178 applies where decree-holder obliged to refund seeks to execute his decree—Period runs from the date of order for such refund.

Where a sale in execution of a decree is set aside at the instance of the judgment-debtor and the decree-holder is ordered to refund the purchase money

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(1) I.L.R., 6 Calc., 663. (2) I.L.R., 27 All., 378.

* Civil Miscellaneous Second Appeal No. 1 of 1906, presented against the order of C. G. Spencer, Esq., District Judge of Gódávari at Rajahmundry, in Appeal Suit No. 15 of 1905, presented against the order of M.R.Ry. K. Rangamannar, District Munsif of Rajahmundry, in Execution Petition No. 1007 of 1904 in Original Suit No. 714 of 1897.

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RAMINEEDI VENKATA APPA RAO v. LAKKOJU CHINA AYYANNA.

paid to him, and the decree-holder subsequently applies to execute his decree, such application in regard to limitation is governed by article 178 [and not 179 of Schedule II to the Limitation Act and time begins to run against the decree-holder from the date when he is ordered to refund the purchase money, when alone his right to apply accrues.

Issurree Dassee v. *Abdool Khalak*, (I.L.R., 4 Calc., 415), followed.

Kalyanbhai Dipchand v. *Ghanasham Lal Jademathji*, (I.L.R., 5 Bom., 29), followed.

THE plaintiff-appellant obtained a mortgage decree and, in execution, property was sold on 10th December 1898. After various proceedings by the judgment-debtor, the sale was set aside on 9th October 1900, and on the purchaser applying for refund of the purchase money, the Court on 19th June 1901 ordered the decree-holder to refund. On 20th June 1904, the decree-holder applied for execution. The Munsif held that the application was not barred and granted it. On appeal, his judgment was reversed and the application dismissed. Plaintiff appealed.

T. V. Seshagiri Ayyar for appellant.

C. Venkatasubbaramiah for respondent.

JUDGMENT.—The material dates are the 9th October 1900 on which the sale was finally set aside, the 19th of June 1901 on which the purchaser obtained an order for refund of the purchase money, and the 20th of June 1904 the date of the appellant's application for another sale. It is conceded that if the starting point of limitation is the 19th of June 1901 the application is in time, the extra day representing a day on which the Court was closed.

The case of *Issurree Dassee* v. *Abdool Khalak*(1) is on all fours with the present case, and is followed in the case of *Kalyanbhai Dipchand* v. *Ghanasham Lal Jadunathji*(2) though the facts there were not entirely the same.

Although there are undoubtedly difficulties in the way of excluding this case from the purview of article 179 of the Limitation Act, we are not prepared to dissent from the cases to which we have referred, and other authorities leading in the same direction. As was pointed out in the Bombay case, there is apparently no "more satisfactory mode of preventing the words of the statute from conflicting with what must have been the intention of the legislature" and of avoiding the "monstrous

(1) I.L.R., 4 Calc., 415.

(2) I.L.R., 5 Bom., 29.

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injustice" which would ensue if article 179 were applied to applications such as that now under consideration.

It was contended that neither article 178 nor 179 applies and that no period of limitation is provided for the case but we proceed on the assumption that article 178 is applicable; the question then arises "On what date did the right to apply accrue?"

The District Judge holds that it accrued on the 9th of October 1900 when the sale was set aside. In his view the decree-holder was then bound to refund the purchase money to the purchaser, and could not, by neglecting to perform his duty, be allowed to postpone the date of limitation indefinitely.

The decree-holder is not however bound to do anything except pay on demand; section 315 of the Code of Civil Procedure empowers the auction purchaser to require repayment, but does not impose upon the decree-holder the duty of tendering the money as soon as the sale is set aside. Can he then, so long as he holds the money, apply for another sale? It is contended that as soon as the sale is set aside, he becomes a trustee for the purchaser in respect of the purchase money in his hands, and that therefore as between himself and the judgment-debtor his debt remains unpaid, and he can at once apply for execution to recover it.

We do not think that that is the true position. When the sale is set aside, the decree-holder is liable to repay the purchase money if called upon by the purchaser to do so, but not otherwise. His position in this respect is analogous to that of the bankers in the case of *Torab Ali Khan and others* v. *Nilruttun Lal and others*(1) who had paid out money to a wrong person: it was held that their cause of action against that person for recovery of the money did not arise before they were compelled to pay the true owner: till then it could not be said that they were damnified by the action of the defendants. "Until the money was paid the plaintiffs did not suffer any loss. The mere demand by the heirs of Asgar Hossein (the real owner) did not give the plaintiffs a cause of action against the defendants, nor did the institution of the suit. The demand might have been abandoned, or the suit dismissed."

So here the judgment-debtor's action in getting the sale set aside did not injure the decree-holder until he was compelled to

(1) I.L.R., 13 Calc., 155.

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RAMINEEDI VENKATA APPA RAO v. LAKKOJU CHINA AYYANNA.

refund the purchase money to the purchaser, and till then he had no right to call upon the judgment-debtor to pay his debt a second time. He could not resist the claim of the purchaser before the District Munsif, and at the same time apply for execution of his decree against his judgment-debtor.

We think he was not entitled to apply before the 19th June 1901 at the earliest, and consequently that his application is not barred by article 178 of the second schedule to the Limitation Act.

We allow this appeal with costs in this and in the lower Appellate Court.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1906. November 16.

MAVULA AMMAL AND ANOTHER (DEFENDANTS—COUNTER-PETITIONERS, NOS. 1 AND 2), APPELLANTS,

v.

MAVULA MARACOIR (PLAINTIFF—PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 586—Provincial Small Cause Court Act IX of 1887, sched. II, art. 41.—No second appeal where in suits for contribution debt in respect of which contribution is sought, is created by the payment itself —Appealability determined by subject-matter of suit and not by amount claimed in execution.

The suits for contribution exempted from the jurisdiction of Courts of Small Causes by schedule II, Act IX of 1887, are suits in which contribution is claimed in respect of payment made by a sharer of money due from a co-sharer. The exemption does not apply to cases where no debt was due from the co-sharer prior to payment, but contribution is sought in respect of a debt which became due only by virtue of such payment. In such cases no second appeal will lie under section 586 of the Code of Civil Procedure if the subject-matter of the suit is less than Rs. 500.

In determining whether second appeals lie in such cases in execution proceedings, the amount of subject-matter of the suit and not the amount sought to be recovered in execution must be taken into consideration.

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* Civil Miscellaneous Second Appeal No. 99 of 1905, presented against the order of J. Hewetson, Esq., District Judge of Madura, in Appeal Suit No. 137 of [illegible] presented against the order of M.R.Ry. S. Ramaswamy Ayyangar, District [illegible] of Paramagudi, in Execution Petition No. 972 of 1904, Execution Petition [illegible] 1904 in Original Suit No. 487 of 1898.

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MAVULA AMMAL v. MAVULA MARACOIR.

THE plaintiff-respondent brought Original Suit No. 487 of 1898 against the defendant-appellants as defendants Nos. 1 and 2 and three others as defendants Nos. 3–5 for recovery of Rs. 275 as the share payable by defendants Nos. 1–5 on account of improvements effected by him in a tope belonging to himself and the defendants Nos. 1–5 and obtained a decree in his favour. The defendants Nos. 3–5 sued in Original Suit No. 157 of 1901 to set aside this decree as fraudulent, and the decree in Original Suit No. 487 was declared not binding on them. The plaintiff applied for execution of the decree against defendants Nos. 1 and 2 for the full amount, the amount claimed in execution being Rs. 526–9–4. The first and second defendants objected that they were liable only for a proportionate share of the amount. The objection was disallowed and execution issued for the full amount. This order was confirmed on appeal. Defendants Nos. 1 and 2 appealed to the High Court.

K. S. Menon for appellant.

K. Narayana Rau for respondent.

JUDGMENT.—A preliminary objection has been taken under section 586 of the Code of Civil Procedure that no second appeal lies since the suit is of the nature cognizable in a Court of Small Causes and the amount of the subject-matter of the suit does not exceed Rs. 500. The appellant relies an article 41 of the second schedule to the Act (IX of 1887). No doubt the present suit is a suit for contribution, but it is not a suit for contribution in respect of a payment made by a sharer of money due from a co-sharer. When the payment was made, in respect of which contribution was claimed in the suit, there was no debt due from the co-sharer. The debt becomes due by virtue of the payment. The appellant has also argued that the preliminary objection must fail, because the amount claimed in the execution proceedings is more than Rs. 500. The test is not the amount claimed in the execution proceedings, but the amount of the subject-matter of the suit. See *Sri Bullov Bhattacharji* v. *Baburam Chattopadhya*(1).

The preliminary objection must be upheld and the Civil Miscellaneous Second Appeal dismissed with costs.

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(1) I.L.R., 11 Calc., 169.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Mill

1906. November 23.

APPAYA SHETTI (PETITIONER), APPELLANT,

v.

KUNHATI BEARI (COUNTER-PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 310-*A—Person acquiring interest in property after Court sale, within a month, can apply under s.* 310-*A.*

Where property is sold in execution of a decree, a person acquiring an inter in such property from the judgment-debtor within a month after such sale, entitled to maintain an application under section 310-A of the Code of Ci Procedure.

Hazari Ram v. *Badai Ram and Nando Lal*, (1 Calc. W.N., 279), dissent from.

RESPONDENT, in execution of a decree obtained by him, broug certain property to sale and became the purchaser on 5th Ju 1905, and, on 5th July 1905, the judgment-debtor mortgaged th properties to appellant, authorising him to apply under secti 310-A to have the sale set aside and reserving a portion of t mortgage amount to pay off the decree-holder. Appellant appli on 5th July 1905 under section 310-A to have the sale set asid The Munsif rejected his application holding that appellant w not a "person whose immoveable property was sold," within th meaning of section 310-A. This judgment was confirmed o appeal.

The appellant appealed to High Court.

K. Naraina Rao for appellant.

Mr. *C. Madhavan Nair* for respondent.

JUDGMENT.—We think the lower Courts have placed to narrow a construction on the words of section 310-A of the Cod of Civil Procedure. We see no reason why the words "whos immoveable property has been sold" should not be construed so a to include cases where a party acquires an interest in the property such as would otherwise entitle him to apply under the sectio

* Civil Miscellaneous Second Appeal No. 13 of 1906, presented against th decree of H. O. D. Harding, Esq., District Judge of South Canara, in Appe Suit No. 279 of 1905, presented against the order of M.R.Ry. M. Narasing Row, District Munsif of Kasargod, dated the 1st August 1905, in executio application No. 326 of 1905 in Original Suit No. 177 of 1902.

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APPAPA SHETTI v. KUNHATI BEARI.

where the interest has been acquired after the sale and before the expiration of the thirty days. This construction seems to be in accordance with the policy of the section which is to protect the judgment-debtor, since cases may well arise in which it is to the interest of the judgment-debtor to transfer his interest with a view to an application under the section being made. Under section 346 title does not pass to the purchaser until the sale is confirmed, and, until confirmation in our view, it is open to the judgment-debtor to transfer his interest so as to entitle the party to whom the interest is transferred to apply under section 310-A. The observation in the judgment in *Erode Manikkoth Krishnan Nair* v. *Puthiedeth Chembakkoseri Krishnan Nair*(1) is no doubt *obiter*, but it supports this view. We are unable to agree with the decision of the Calcutta High Court in *Hazari Ram* v. *Badai Ram and Nando Lal*(2), upon which the Munsif relied. The appeal is allowed with costs here and in the Courts below.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1906. October 26.

MARIVITTIL MATHU AMMA AND ANOTHER (PETITIONERS—DEFENDANTS NOS. 6 AND 2), APPELLANTS,

v.

PATHRAM KUNNOT CHERUKOT AND OTHERS (COUNTER-PETITIONERS—PLAINTIFFS NOS. 1 TO 3 AND FIRST DEFENDANT'S LEGAL REPRESENTATIVES), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 244, 278—Application in execution of decree against karnavan by a member of the tarwad.

Where a decree is passed against the karnavan of a tarwad in his representative capacity, all the members of the tarwad must be held to be parties to the suit and such members in execution proceedings must proceed under section 244 of the Civil Procedure Code and not under section 278.

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(1) I.L.R., 26 Mad., 365. (2) 1 Calc. W.N., 279.

* Civil Miscellaneous Second Appeal No. 101 of 1905, presented against the decree of M.R.Ry. M. Mundappa Banjera, Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 198 of 1905, presented against the order of Mr. F. J. DeRozario, Additional District Munsif of Calicut, in Miscellaneous Petition No. 478 of 1904 in Original Suit No. 628 of 1902.

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MARIVITTIL MATHU AMMA v. PATHRAM KUNNOT CHERUKOT.

A DECREE was passed against the deceased first defendant in Original Suit No. 628 of 1902 as karnavan of the tarwad of which the petitioners appellants are members. In execution of the decree certain properties were attached and appellants put in a petition for release of the properties attached on the ground that the properties belonged not to the common tarwad but to their own Tavazhi. The petition was rejected. On appeal, the District Court held that no appeal lay as the petition must be considered to have been presented by petitioners under section 278 and not under section 244, as although they were defendants in the suit, their claim was put in not as defendants in the suit but on behalf of their own tavazhi.

Petitioners appealed to the High Court.

M. Goindan Nair for appellant.

T. R. Ramachandra Ayyar for respondent.

JUDGMENT (BENSON, J.).—Not only defendants Nos. 2 and 6 but also all the members of their tavazhi must be held to be bound by the decree against the tarwad and parties to the suit on the principle laid down in *Kamal Kutti* v. *Ibrayi*(1).

The decisions relied on by the Subordinate Judge are not in point. The appellants' right to object to the attachment is therefore under section 244 not under section 278, Civil Procedure Code.

The decree of the Subordinate Judge is therefore wrong. It is set aside and he must restore the appeal to his file and dispose of it in accordance with law. Costs in this Court will abide.

WALLIS, J.—I agree. In this case a decree has been given against the karnavan as representing the members of the whole tarwad. In accordance with the decision in *Kamal Kutti* v. *Ibrayi*(1), all the members of the tarwad must be taken to be parties to the suit for the purpose of execution proceedings, and, if parties, they must proceed under section 244 and not under section 278. The fact that they claim the property, which has been attached, adversely to the other members of the tarwad does not make them any less constructive parties to the decree. In *Ramanathan Chettiar* v. *Levvai Marakayar*(2), a defendant who objected to the attachment of property of which he was trustee was allowed to proceed under section 278, because he was claiming as trustee on

(1) I.L.R., 24 Mad., 658. (2) I.L.R., 23 Mad., 195.

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behalf of persons who were not parties to the suit, and similarly in *Abdurahiman Kutti Haji* v. *Kunhammed Koya*(1), a karnavan against whom there was a personal decree only was allowed to proceed under section 278, because he was claiming on behalf of persons who were not parties to the suit. The facts in *Rengan Patter* v. *Lakshmi Neithiar*(2) appear to have been similar.

MARIVITTIL MATHU AMMA v. PATHRAM KUNNOT CHERUKOT.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1906. November 12, 21.

KURELLA CHENCHAYYA (PETITIONER IN EXECUTION APPLICATION IN SMALL CAUSE SUIT No. 1166 OF 1904 ON THE FILE OF THE ADDITIONAL SUB-COURT, GODAVARI),

v.

POLISETTI SITARAMASWAMY (COUNTER-PETITIONER IN EXECUTION APPLICATION IN SMALL CAUSE SUIT No. 1166 OF 1904 ON THE FILE OF THE ADDITIONAL SUB-COURT, GODAVARI).*

Provincial Small Cause Courts Act, Act IX of 1887, s. 35 – Application under, to be made in Court having jurisdiction at time of application.

Where a Court of Small Causes is abolished after having passed a decree, the Court in which, under section 35 of Act IX of 1887, proceedings are to be taken in respect of such decree, is the Court in which the suit, if instituted at the time of such application, would have to be instituted.

Where the jurisdiction in such a case is to be determined by considering the place of residence of the defendant, his residence at the time of the application is to be considered as his place of residence.

THE facts necessary for the report of this case appear in the Order of Reference which was as follows :—

"Upon the application of the decree-holder in Small Cause Suit No. 1166 of 1904 on the file of the Additional Sub-Court of Rajahmundry, I have the honour to refer the following questions for the opinion of the High Court under section 617 of the Civil Procedure Code. The questions arise in an application under

(1) 10 M.L.J., 85. (2) 14 M.L.J., 137.

* Referred Case No. 3 of 1906, stated under section 617 of Act XIV of 1882, by the District Munsif of Ellore in Small Cause Suit No. 1166 of 1904 on the file of the Additional Subordinate Judge's Court of Rajahmundry.

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KURELLA CHENCHAYYA v. POLISETTI SITARAMA-SWAMY.

section 223 of the Civil Procedure Code, made by the decree-holder for transmission of the decree for execution to the District Munsif's Court of Gudivada. The decree was passed by the late Additional Sub-Court of Rajahmundry which exercised small cause jurisdiction over the District Munsifs of Ellore, Tanuku and late Narsapur.

2. From the execution petition filed, this appears to be the first application after decree. The judgment-debtor according to the decree was a resident of Masulipatam. It is now alleged that he has properties in Gudivada and is resident there.

3. Application is made to this Court for a certificate, etc., under section 223 on the ground that this Court succeeded the late Rajahmundry Court within the meaning of section 35 of the Provincial Small Cause Courts Act.

4. Under that section proceedings before or after decree which might have been had in a Court which had ceased to exercise jurisdiction may be had in the Court which if the suit out of which the proceedings had arisen were about to be instituted would have jurisdiction to try the suit. If the suit were to be laid now it should be in the Sub-Court of Ellore under section 16 within whose small cause jurisdiction (Gudivada, Narsapur including old Bhimavaram and Bezwada Munsifis) the defendant resides. At the time the suit was laid defendant was a resident of Masulipatam and the suit could, therefore, have been laid in the District Munsif's Court, Masulipatam.

5. A personal action should ordinarily be filed in the Court within whose jurisdiction defendant resides. The suit may not be instituted anywhere else unless the Court grants leave to the plaintiff to do so. In the present case the defendant did not reside within this Court's jurisdiction either at the time of the institution of the suit or now. I therefore consider that the application for transmission should be made to the Ellore Sub-Court if transmission under section 223 were necessary, (2) that defendant being resident in Gudivada petitioner could apply in the District Munsif's Court of Gudivada without any transmission under section 223.

6. As, however, it was represented that similar applications in other Courts have not been entertained and the question has become of general importance I was desired to refer the matter to the High Court. I may point out that a transmission by a Court

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KURELLA CHENCHAYYA v. POLISETTI SITARAMASWAMY.

which did not pass the decree will be a meaningless formality as there is no record whatever in such Court either to show that any decree was passed or as to what execution was previously taken at Rajahmundry. The suit and execution registers and other records are in the custody of the District Court at Rajahmundry, and I doubt whether it would be considered expedient to have the registers containing suits from various Munsifis sent for on each such application.

7. The questions I beg to refer are—

I. Whether on the abolition of the Sub-Court at Rajahmundry the decree-holders desiring to execute their decrees against defendants residing outside the jurisdiction of that Court could apply in the District Munsif's Court within whose local jurisdiction defendant resides without application for transmission of record under section 223.

II. If, however, such application is necessary whether it should be made to the Court where the defendant resided at the time of the institution of the suit or at the time the application is made."

The parties were not represented.

JUDGMENT.—The suit was instituted in Rajahmundry Additional Subordinate Judge's Court as a small cause suit. That Court passed a decree and was subsequently abolished. Its records and registers are kept in the District Court of Godavari at Rajahmundry, but the District Court has no jurisdiction of any sort over the town of Ellore. The suit was on a promissory note executed in Ellore town by a resident of Masulipatam now residing at Gudivada. The Rajahmundry Court had small cause jurisdiction over Ellore town: it entertained the suit because the contract was made in Ellore. There was then no Subordinate Court at Ellore.

Now, according to the District Munsif, the Subordinate Court at Ellore would have jurisdiction to entertain the suit, because it has jurisdiction over Gudivada where the defendant resides. If it has small cause jurisdiction over Ellore town or Gudivada no other Court would have jurisdiction to entertain the suit if instituted now (section 16 of the Provincial Small Cause Courts Act).

Masulipatam may be left out of consideration because if the suit was instituted now it would be in a Court having jurisdiction

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over the place where the defendant resides now and therefore in Gudivada, if not in Ellore, Subordinate Court.

We answer the first question not generally as put but in respect of this special case. If the Subordinate Court of Ellore is the Court in which the suit if instituted now should be instituted, the application must be made there.

As to the second question where the jurisdiction is to be determined by considering the place of residence of the defendant, his residence at the time of the application is to be considered as his place of residence.

APPELLATE CRIMINAL.

Before Mr. Justice Benson.

1906. September 14.

EMPEROR

v.

MAYANDI KONAN AND ANOTHER.*

Madras District Municipalities Act IV of 1884, s. 188 (n)—Not necessary to constitute offence that the cattle should have been kept for purposes of trade—No offence if cattle not habitually kept.

An offence under section 188 (*n*) of Madras Act IV of 1884 is committed when a person keeps more than 10 head of cattle in a private place, though not for purposes of trade. It is necessary, however, that there must be regular user of the place for keeping more than 10 head of cattle; and a mere temporary user for such purpose will not constitute the offence.

THE accused in these cases were prosecuted under section 188 (*n*) of the Madras District Municipalities Act for not obtaining licenses for keeping more than ten head of cattle. The cattle admittedly were not kept for purposes of trade and it was proved that the usual number kept was less than 10, although such number was exceeded on a particular occasion. The Bench before which the cases were tried held that, as the cattle were not kept for purposes of trade, no offence was committed and acquitted the accused.

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* Criminal Appeals Nos. 324 and 325 of 1906, presented under section 417 of the Code of Criminal Procedure against the judgments of acquittal passed on the accused in Summary Trials Nos. 1073 and 1074 of 1905, respectively, by the Bench Magistrates at Srirangam.

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Appeals were preferred against the orders of acquittal.

The Public Prosecutor for appellant.

A. S. Balasubrahmania Ayyar for accused.

JUDGMENT.—The construction placed by the Bench of Magistrates on section 188, clause (*n*) of the Madras District Municipalities Act No. IV of 1884 is erroneous. The words "offensive and dangerous trades" are merely words of general description to facilitate reference, and cannot limit or control the plain words of the section which are "no place shall be used for any one or more of the purposes specified" in the section unless licensed. It is the place that must be licensed for one or more of the purposes specified.

In the present case, however, the finding is that the place was not being regularly used for keeping 10 or more head of cattle, though that number was found there on one occasion by the Inspector. The user was found to be of a merely temporary character, and, in view of this finding, it does not appear to be necessary in the interest of public justice to set aside the acquittal.

The appeals are dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Benson.

EMPEROR

v.

NAGAN CHETTY.*

1906. September 25.

Madras District Municipalities Act IV of 1884, s. 222—Section applies to lanes having no side drains or ditches.

The obligation imposed on house-owners by section 222 of the District Municipalities Act, of not letting dirty water pass into the street is not conditional on the existence of drains made by the municipality.

The hardship which may be inflicted on house-owners where the municipality has provided no drains is a matter to be considered in graduating the penalty.

THE facts are fully stated in the judgment.

The Acting Public Prosecutor for appellant.

C. Venkatasubbaramiah for accused.

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* Criminal Appeal No. 385 of 1906, presented under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused in Calender Case No. 95 of 1906 by the Court of Bench Magistrate of Karur,

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EMPEROR v. NAGAN CHETTY.

JUDGMENT.—The view of the Bench of Magistrates that section 222 of Act IV of 1884 (Madras) does not apply to lanes having no side drains or side ditches is erroneous, as was pointed out in the case of *Queen-Empress* v. *Sevudappayyar*(1). The amendment of the section, which was made by Act III of 1897, does not affect the present question. The words "except a drain" after "street" are inserted in the section, because a "street" as defined in the Act includes a drain where there is such in or on the side of a street, but they do not imply that every street to be within the purview of the section must have a drain in, or by the side of it. The Legislature has not made the providing of drains by the municipality a condition precedent to the obligation imposed upon the owner or occupier. There may be practical hardship in enforcing the obligation in particular cases where no drains are provided by the municipality, but the Magistrates have power to graduate the penalty according to all the facts of each case.

As the acquittal is based on an erroneous view of the law it is set aside and the Bench must restore the case to their file and dispose of it according to law.

APPELLATE CRIMINAL.

Before Mr. Justice Benson.

1906. September 7.

IN THE MATTER OF "ALRAJA NAIDU."

Defamation—No prosecution lies for, in respect of answers given by a party to questions asked by Court.

It is contrary to public policy that a person bound to state the truth in answer to questions put to him by a Court should be liable to be prosecuted for defamation in respect of answers so given, though untrue and not given in good faith.

Manjaya v. *Sesha Shetti*, (I.L.R., 11 Mad., 477), followed.

THE complainant brought a suit for money against the defendant in the Munsif's Court. The defendant pleaded that the suit was

(1) I.L.R., 15 Mad., 91.

* Criminal Revision Case No. 191 of 1906, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of M.R.Ry. R. Nagasundram Ayyar, Deputy Magistrate of Arni Division, dated 23rd February 1906, in Calendar Case No. 1 of 1906.

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brought out of spite and in answer to questions put to him by the Court, he gave answers which were defamatory of plaintiff. On these facts, the accused was convicted of an offence under section 500, Indian Penal Code, by the Deputy Magistrate and sentenced to pay a fine of Rs. 15.

IN THE MATTER OF ALBAJA NAIDU.

The material portion of his judgment is as follows:—

"The accused's story of the complainant's wife attempting to drag him to go and swear in a temple cannot be believed. As this story is not credible, the accused's plea that he made the statement in good faith for the protection of his own interests in the civil suit cannot be accepted. The statement could not have been made in good faith, as the accused has not been able to prove that he was waylaid by complainant's second wife as alleged. Though the accused did not actually say that the second wife of the complainant misconducted herself or was unchaste, his story led to the inference in the minds of the hearers that the woman was not considered chaste."

The accused moved the High Court under section 435 of the Code of Criminal Procedure.

The Hon. Mr. *L. A. Govindaraghava Ayyar* for petitioner.

ORDER.—The petitioner was a party to a civil suit and was examined by the District Munsif in relation to it under section 118 of the Civil Procedure Code and then made the statement said to be defamatory. It is not clear whether he was examined on solemn affirmation; but in any case he was under sections 5 and 13 of the Indian Oaths Act under an obligation to state the truth, and was liable to a prosecution for giving false evidence if he spoke falsely. That being so, he is not liable to a prosecution for defamation for using the language he did. This is a matter of public policy as explained in *Manjaya* v. *Sesha Shetti*(1). I set aside the conviction and order the fine, if paid, to be refunded.

(1) I.L.R., 11 Mad., 477.

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APPELLATE CRIMINAL.

Before Mr. Justice Benson.

1906. September, 25, 27.

MUTHIAH CHETTY

v.

EMPEROR.*

Criminal Procedure Code,—Act V of 1898, *ss.* 215, 436—*Section* 215 *applies, only to a commitment actually made and not to order by Sessions Judge directing committal.*

The provisions of section 215 of the Code of Criminal Procedure apply only to a commitment actually made and not to a case where a Sessions Judge in exercise of the powers, vested in him by section 436 of the Code, sets aside an order of discharge made by a Magistrate and directs a committal to the Sessions. In such cases the High Court may consider the facts, as well as the questions of law involved, to determine whether the Sessions Judge has exercised a proper discretion.

Pirthi Chand Lal v. *Sampatia*, (7 C.W.N., 327), referred to.

THE petitioner was the first accused and the counter-petitioner, the complainant in Revision Case No. 2 of 1906 on the file of the Sub-divisional Magistrate of Madura Division. The complaint was for offences under sections 420 and 467 of the Indian Penal Code. The Magistrate discharged the accused under section 209 of the Code. Complainant petitioned the Sessions Court to set aside the order of discharge under sections 435 and 437 of the Code. The Sessions Judge set aside the order of discharge and directed the committal of the first accused to the Sessions.

The first accused presented criminal revision petition to the High Court under sections 435 and 439 of the Code.

Mr. *A. Cowdell* and *K. N. Ayya* for petitioner.

The Acting Public Prosecutor for the Crown.

ORDER.—The Public Prosecutor argues that section 215 of the Code of Criminal Procedure indicates that the High Court ought not to interfere with a Sessions Judge's order directing a commitment to be made, except on a point of law. That section

* Criminal Revision Case No. 186 of 1906, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of A. F. Pinhey, Esq., Sessions Judge of Madura Division, in Criminal Revision petition No. 8 of 1906, setting aside the order of discharge of the Sub-divisional First-class Magistrate, Madura Division, in Register Case No. 2 of 1906.

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refers only to a commitment actually made and there is the direct authority of the case of *Pirthi Chand Lal* v. *Sampatia*(1) against the contention of the Public Prosecutor and the observations in *Queen-Empress* v. *Balasinnatambi*(2) and *Hari Doss Sanyal* v. *Saritulla*(3) support the view in *Pirthi Chand Lal* v. *Sampatia*(1).

I have no doubt that it is open to the High Court to consider whether the Sessions Judge has or has not exercised a proper judicial discretion under section 436 of the Criminal Procedure Code in setting aside a Magistrate's order of discharge, and that for this purpose the High Court may consider the facts as well as the questions of law involved. Though the High Court has this power, I need hardly say that it will only exercise it where it is manifest that the Sessions Judge's order is improper, as, for instance, where there is no evidence to prove the offence charged or where it is clear that the Court would not act on the evidence.

In the present case the facts have been fully argued before me by Mr. Cowdell for the petitioner, and by the Public Prosecutor and I find that there is the direct evidence of three witnesses, viz., the complainant and the fifth and seventh prosecution witnesses, that exhibit A is a forgery, and there are circumstances referred to by the Sessions Judge which may be considered to support the charge. On the other hand, there are several considerations referred to by the Magistrate who held the preliminary enquiry which make it improbable that the charge is true. But the ultimate question is whether the direct evidence of the three prosecution witnesses who speak directly to the alleged forgery is true or false.

The offence alleged being a grave one, and as such, triable under the scheme of the Code only by a Court of Sessions, it is desirable that the truth of the evidence of these witnesses, and the value to be attached to the counter considerations urged by the Magistrate, should be tested and weighed by a superior Court with the aid of assessors and with the advantage of hearing the witnesses give their evidence in the presence of the Court.

For these reasons I must decline to set aside the order of the Sessions Judge.

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(1) 7 C.W.N., 327. (2) I.L.R., 14 Mad., 338.
(3) I.L.R., 15 Calc., 621.

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APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1906.
September
13, 17.

ANNA AYYAR AND OTHERS

v.

EMPEROR.*

Superintendence, powers of, of High Court—Criminal Proceedings, stay of whe civil suit on same facts pending.

The defendant in a civil suit ought not to be allowed to prejudice the tri of such suit by launching and proceeding with a criminal prosecution on th same facts against the plaintiff and his witnesses and such proceedings i launched, will be stayed by the High Court in the exercise of its powers o superintendence.

Eadara Viranna v. *The Queen*, (I.L.R., 3, Mad., 400), distinguished; *In re Deva Valad Bhavani*, (I.L.R., 18 Bom., 581), distinguished; and (*Raj Kumari Debi* v *Bamasundari Debi*, (I.L.R., 23 Calc., 610), distinguished.

ONE S, the daughter of first petitioner and sister of petitioner Nos. 2—4 died, leaving a will by which she bequeathed he properties to her brothers, petitioners Nos. 2—4. Sixth petitione wrote the will and petitioners Nos. 7—9 attested it.

The will on being presented to the Sub-Registrar for registratio was objected to by counter-petitioner on the ground that it wa not executed by the deceased S.

The Sub-Registrar and, on appeal, the District Registrar refused registration on the ground that the execution of the will was no proved.

Petitioners Nos. 2—4 filed a civil suit for the registration o the document under section 77 of the Registration Act agains counter-petitioner. While the suit was pending, the counter-petitioner, without obtaining sanction, preferred a complain before the Magistrate against the petitioners alleging that they had forged the said will of S. Petitioners applied to the Magistrat

* Criminal Revision Case No. 248 of 1906, presented under sections 43 and 439 of the Code of Criminal Procedure, praying the High Court to call fo the records in Petition Revision Case No. 2 of 1906 on the file of M.R.Ry. T. G Virabadra Pillai, Sheristadar-Magistrate of Hosur, to revise his order confirme by J. H. Robertson, Esq., District Magistrate of Salem, in Criminal Miscella neous Petition No. 2 of 1906 by directing the complaint to be dismissed fo want of necessary sanction or by directing stay of proceedings in the said Preliminary Register Case No. 2 of 1906, pending the disposal of Civi Suit No. 707 of 1905, on the file of District Munsif's Court of Krishnagiri.

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to stay proceedings in the criminal case until the civil suit should be decided. He refused to do so and the District Magistrate, on application to him, declined to interfere.

The petitioners, therefore, applied to the High Court to stay proceedings in the criminal case.

The Hon. Mr. *L. A. Govindaraghava Ayyar* for petitioners.

The Acting Public Prosecutor opposed the application.

JUDGMENT.—It is not contested that sanction under section 195 (*c*) is necessary in the case of the second, third and fourth accused who are parties in the civil suit instituted before the commencement of these proceedings. The complaint must, therefore, be dismissed so far as concerns these accused. As regards the other accused we think that section 195 (*c*) does not render sanction necessary as they are not parties to the proceeding in which the document has been produced. It remains, however, to be considered whether the prosecution should be allowed to go on against them pending the trial of the civil suit. In the circumstances of the present case we think it should not. The suit is one under section 77 of the Registration Act III of 1877 praying for the registration of a will, and, in this suit, accused Nos. 2 to 4 are plaintiffs, the other accused are likely to be plaintiff's witnesses and the defendant is the present complainant. After the institution of this civil suit the defendant preferred the present complaint against the plaintiffs and their witnesses charging them with forgery of the will.

In our opinion the defendant in a civil suit ought not to be allowed to prejudice the trial of such suit by launching and proceeding with a criminal prosecution on the same facts against the plaintiffs and their witnesses pending the trial of such suit, and in the exercise of our powers of superintendence we direct that the proceedings against the accused other than the accused Nos. 2 to 4 be stayed pending the trial of the civil suit. The circumstances of the present case, we may observe, are entirely different from those in the cases of *Eadara Virona* v. *The Queen*(1), *In re Devji Valad Bhavani*(2) and *Raj Kumari Debi* v. *Bamasundari Debi*(3). In the Madras case the prosecution was instituted after the trial, in the Bombay case the prosecution had been directed

(1) I.L.R., 3 Mad., 400. (2) I.L.R., 18 Bom. 581.
(3) I.L.R., 23 Calc., 610.

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ANNA AYYAR v. EMPEROR.

by the Court under section 478 of the Code of Criminal Procedure after an enquiry into a claim petition under section 278 of the Code of Civil Procedure, and in the Calcutta case, the Criminal proceedings were instituted first and the civil suit appeared to have been filed by way of answer to it.

APPELLATE CRIMINAL.

Before Mr. Justice Benson.

1906. October 9.

EMPEROR

v.

MANIKKA GRAMANI AND OTHERS.*

Criminal Procedure Code—Act V of 1898, *ss.* 423 (1), 528—*Appellate Court can itself try the offender—Cognizance in such cases under s.* 190 (*b*) *and not* 190 (*c*). *Section* 423 (1) (*b*) *of the Code of Criminal Procedure ought to be read with s.* 528 *of the Code.*

The provisions of section 423 (1) (*b*) do not preclude an Appellate Court, when it reverses the finding and sentence under appeal, from trying the offender itself, if the offence is one ordinarily triable by it. In such cases, the Appellate Court takes cognizance under section 190 (*b*) and not section 190 (*c*).

THE counter-petitioners were convicted by the Second-class Magistrate of Saidapet of offences under section 147, Indian Penal Code. The Deputy Magistrate on appeal was of opinion that the facts disclosed offences under sections 148, 324 and 326 of the Indian Penal Code, and quashing the conviction and sentences tried the case himself and convicted the counter-petitioners. On appeal, the Sessions Judge held that under section 423 (1) (*b*), the Deputy Magistrate had jurisdiction only to order a retrial by a Magistrate subordinate to him, and further that having taken cognizance under section 190 (*c*) of the Code, he ought, under section 191, to have informed accused of their right to have the case tried by another Magistrate. He held the proceedings void

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* Criminal Revision Case No. 315 of 1906, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of V. Venugopaul Chetty, Esq., Sessions Judge of Chingleput, in Criminal Appeal No. 2 of 1906, presented against the judgment of Mohammed Oosman Sahib, Deputy First-class Magistrate of Saidapet Division, in Calendar Case No. 259 of 1905.

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on both the grounds, and directed a retrial by some other First-class Magistrate.

EMPEROR v. MANIKKA GRAMANI.

The Government moved the High Court under sections 435 and 439 of the Code.

The Public Prosecutor for petitioner.

Mr. *E. R. Osborne* for accused.

JUDGMENT.—The petition is not opposed. I am of opinion that the order of the Sessions Judge directing a retrial is erroneous.

The Sub-Divisional Magistrate as the Court hearing appeals from the Second-class Magistrate had jurisdiction under section 423 (1) (*b*) of the Code of Criminal Procedure to reverse the finding and sentence of the Second-class Magistrate and to order a retrial by a Court of competent jurisdiction subordinate to him as an Appellate Court. These latter words when read with section 528 are not to be taken as words of limitation, and do not exclude the Appellate Court from itself trying the offender, the offence being one within the ordinary jurisdiction of the Sub-Divisional Magistrate. This was expressly decided by this Court in the case of Vedakadeth Kanaran(1).

The Sessions Judge was also in error in holding that the Sub-Divisional Magistrate entertained the complaint under section 190 (1) (*c*). If that section had any application at all, it is clear that the Magistrate acted under clause (*b*) as he had before him the police charge sheet stating all the facts.

The order of the Sessions Judge is set aside and he is directed to restore the appeal to his file and to dispose of it according to law.

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(1) Weir's 'Law of Offences,' 4th edition, Vol. II, page 481.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1906. October 19, 23, 24.

BALAMONEY (PLAINTIFF), PETITIONER,

v.

RAMASAMI CHETTIAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 130—*Discretionary power of Court under s.* 130 *not interfered with on revision—Such power should be exercised with caution.*

The High Court will not in revision interfere where a lower Court, in the exercise of its discretionary power, refuses inspection of documents produced before it under a sealed cover in obedience to an order under section 130 of the Civil Procedure Code.

The power of refusing inspection should, however, be exercised with great caution; and the opposite party should be allowed to inspect and take copies of the documents when they relate to matters in issue, unless they are privileged in law, relate *exclusively* to the case of the party producing them and contain nothing supporting or tending to support the other side.

THE facts necessary for this report are set out in the judgment.

S. Srinivasa Ayyangar and *N. R. K. Thathachariar* for petitioner.

T. V. Seshagiri Ayyar and *K. Ramachandra Ayyar* for respondents.

JUDGMENT.—Following the decision *In re Nizam of Hyderabad*(1) and *Motilal Kashibhai* v. *Nana*(2), we must refuse to interfere in revision with the order of the District Munsif that the plaintiff should not be at liberty to inspect the documents produced in Court by the defendants in a sealed cover. The documents were produced in obedience to an order of the Court made under section 130 of the Civil Procedure Code, and the Court has jurisdiction to deal with such documents when produced in such manner as appears just. We cannot interfere in revision with the discretion exercised by the Court under this section, but it

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* Civil Revision Petition No. 167 of 1906, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of M.R.Ry. C. V. Visvanatha Sastri, District Munsif of Kumbakonam, in Copy Petition No. 348 of 1906 in Original Suit No. 393 of 1905.

(1) I.L.R., 9 Mad., 257. (2) I.L.R., 18 Bom., 35.

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may be advisable to state the principles on which it should, in our opinion, be exercised in cases such as the present. The documents have been filed as relating to matters in issue in the suit, and we think the opposite party should be allowed to inspect and take copies of them unless they are privileged in law, relate *exclusively* to the case of the party producing them, and contain nothing supporting or tending to support his opponent's case. In the present case the affidavit in support of the objection to giving inspection merely states that the documents support the defendant's case, but does not show that they support the defendant's case exclusively, and that they contain nothing which would support or tend to support the plaintiff's case. Further where, as here, the letters, inspection of which is denied, are letters written by the party seeking inspection, we think a very strong case should be made out for refusing inspection.

BALAMONEY v. RAMASAMI CHETTIAR.

The petition is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

KATTIKA BAPANAMMA (PLAINTIFF), APPELLANT,

v.

KATTIKA KRISTNAMMA (DEFENDANT), RESPONDENT.*

1906. October 25, 30.

Evidence Act—I of 1872, s. 92, prov. 4—Subsequent oral agreement to discharge prior registered agreement not receivable, but actual discharge may be proved.

A agreed by registered deed to give B for her life an annual amount by way of maintenance, and subsequently it was agreed orally that B should enjoy certain lands in lieu of such maintenance and B was put in possession. In a suit by B to recover arrears of maintenance from A:

Held, that the subsequent oral agreement was an agreement to rescind or modify the original registered agreement and was not receivable in evidence under proviso 4 to section 92 of the Evidence Act.

Held further, that it was open to the defendant to prove that the arrears claimed were actually discharged by the plaintiff taking possession, although the agreement to discharge cannot be proved.

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* Civil Miscellaneous Appeal No. 73 of 1906 presented against the order of remand made by C. G. Spencer, Esq., District Judge of Gódávari, in Appeal Suit No. 276 of 1905 presented against the decree of M.R.Ry. T. R. Kuppuswamy Ayyangar, District Munsif of Rajahmundry, in Original Suit No. 684 of 1904.

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KATTIKA BAPANAMMA v. KATTIKA KRISTNAMMA.

SUIT by plaintiff to recover arrears of maintenance due under a registered deed executed by the defendant to plaintiff. The further facts are sufficiently stated in the judgment. The plaintiff preferred this appeal against the order of remand of the District Court.

P. Narayanamurti for appellant.

V. Ramesam for respondent.

JUDGMENT.—This is a suit by a step-mother against her step-son to recover arrears of maintenance under a registered deed by which the defendant agreed to pay her an annual sum for maintenance and to give her a share of a house to reside in during her life. The defendant pleaded that, having been unable to pay maintenance at the stipulated rate, he had come to an oral settlement with the plaintiff under which he gave the plaintiff possession of certain land to be enjoyed for her life-time, and that subsequent to such settlement the plaintiff had been in enjoyment of the said land and the profits thereof. The District Munsif refused to allow evidence of this oral settlement to be given and gave judgment for the plaintiff. The District Judge reversed this judgment on appeal on the ground that the oral settlement did not contradict, vary, add to, or subtract from, the terms of the original contract, but only provided for its discharge. In our opinion the settlement pleaded is an agreement to rescind or modify the original agreement within the fourth proviso to section 92 of the Evidence Act and as such is inadmissible in evidence, and the plaintiff is entitled to future maintenance at the rate stipulated in the original agreement. But this being a suit for arrears of maintenance for certain years, it was open to the defendant to plead as he has pleaded that, in discharge of the defendant's obligation to pay maintenance for such years, she agreed to take and took possession of certain lands; and it is immaterial that she is alleged to have taken possession of the land in pursuance of an agreement which cannot be proved. The case appears to us to be on all fours with *Karampalli Unni Kurup* v. *Thekku Vittil Muthorakutti*(1), and also to be governed by *Goseti Subba Row* v. *Varigonda Narasimham*(2). The defendant cannot prove the agreement to discharge the claim for maintenance in the manner alleged, but he may prove that the arrears have been, in fact, discharged in the manner alleged.

(1) I.L.R., 26 Mad., 195. (2) I.L.R., 27 Mad., 368.

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The District Munsif being of opinion that the alleged agreement could not be proved, disposed of the case without finding whether the arrears had, or had not, in fact, been discharged. He appears to have considered that no evidence of the discharge could, under the circumstances, be given, and he did not enter on the merits at all. The order of the District Judge remanding the case was therefore right and we dismiss the appeal with costs.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

RANGASAMI GOUNDAN AND OTHERS, PETITIONERS.

1906. November 29.

v.

EMPEROR.*

Criminal Procedure Code—Act V of 1898, *s.* 526—*Transfer of criminal case—Magistrate having prejudged accused in another case, sufficient ground for transfer.*

Where the Magistrate has, in a counter case brought by the accused on the same facts, prejudged the guilt of the accused, the High Court will, in the interests of justice, transfer the case against the accused to some other Court.

THE facts necessary for the report of this case are sufficiently stated in the judgment.

V. Krishnaswami Ayyar and *N. Rajagopalachariar* for petitioners.

The Public Prosecutor *contra*.

ORDER.—There are two cases Calendar Cases Nos. 102 and 103, in which charges and counter-charges of rioting have been made. The Head-quarters Deputy Magistrate, Coimbatore, heard the prosecution evidence in Case No. 102 and then, without hearing the defence evidence in that case, interposed Case No. 103, heard the prosecution evidence in that case, and, on that evidence,

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* Criminal Miscellaneous Petition No. 220 of 1906, praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to transfer Calendar Case No. 102 of 1906 from the file of the Court of the Head-quarters Deputy Magistrate of Coimbatore to that of any other Court in the District.

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RANGASAMI GOUNDAN v. EMPEROR.

discharged the accused in that case. In his order of discharge he expressed himself in decided terms as to the guilt of the prosecuting party in Case No. 103 who are the accused in Case No. 102. The course adopted by the learned Magistrate seems to us to be likely to prejudice the accused in Case No. 102. It may be that the evidence which the accused in Case No. 102 adduced as prosecutors in Case No. 103 is substantially the same as the evidence that would have been adduced on their behalf if Case No. 102 had proceeded in the ordinary way and the evidence for the defence in that case had been heard. But assuming this to be so, it does not follow that evidence which, when adduced on behalf of the prosecution, is insufficient to establish a charge will, if adduced on behalf of the defence with reference to the same charge, be also insufficient. In Case No. 103 when the onus was on the accused in Case No. 102, the Magistrate held the evidence was insufficient. It does not follow he would come to the same conclusion when the onus is not on those accused, but he has nevertheless, as it seems to us, prejudged their guilt by his observations in the order of discharge in case No. 103.

On principle we do not think this case can be distinguished from that reported (*In re Chakowri Lall* v. *Moti Kurmi*(1)).

The case (Calendar Case No. 102 of 1906) will be transferred to the file of such Magistrate as the District Magistrate may direct.

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(1) 13 C.L.R., 275.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

ARUNACHELLAM CHETTI AND OTHERS (DEFENDANTS), APPELLANTS,

v.

SUBRAMANIAN CHETTI (PLAINTIFF), RESPONDENT.*

1906.
November 30.
December 4,
5, 6, 7, 21.

Transfer of Property Act IV of 1882, s. 130—'Actionable claim'—Claim not actionable unless cause of action already matured—Set off—Debtor can set off against assignee independent claims against assignor—Right of set off lost by conduct amounting to discharge of claim sought to be set off—Principal and surety—Mortgagor postponing right does not lose his personal remedy—Decree, when conditional on result of a different suit.

Under section 130 of the Transfer of Property Act as it stood before it was amended by Act VI of 1900, a claim was not actionable unless it was 'a claim in res[illegible] cause of action which has already matured and which subject, to procedure, may be enforced by suit.'

Shib Lal v. Azmat Ullah, (I.L.R., 18 All., 265), followed.

In an action by the assignee of a debt, the debtor-defendant is entitled to set off a debt due to him by the assignor at the date of the assignment, even when the amount claimed to be set off is due under a transaction independent of and unconnected with the claim assigned to plaintiff. Such right of set off will not be open to the defendant, if, by his conduct, he has given up his right to proceed against the assignor personally for the debt.

A mortgagee who consents to postpone his rights and accept the position of a second mortgagee, with the concurrence of the mortgagor, does not thereby lose his personal remedy against the mortgagor.

Where a debtor transfers his property, with directions to pay off his debts, to a trustee, who does not undertake any personal liability to the creditors, the relationship of principal and surety is not constituted between the trustee and debtor, respectively.

The fact that the defendant in a suit by the assignee is prosecuting a suit against the assignor, in which he might be awarded certain equitable reliefs against the assignor is no ground for refusing an unconditional decree to the assignee in his suit, unless the claims in the two suits are based on obligations arising out of the same contract and are so closely intertwined with each other as to make it equitable that they should be set against one another.

Government of Newfoundland v. Newfoundland Railway Company, (L.R., 13 A.C., 212), referred to and distinguished.

Fleming v. Loe, ([1901], 2 Ch. D., 594), referred to and distinguished.

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* Appeal Nos. 46 of 1904 and 133 of 1905, presented against the decrees of M.R.Ry. T. Varada Row and W. Gopalachariar, Subordinate Judges of Madura (East), in Original Suit Nos. 60 of 1900 and 57 of 1903, respectively.

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ARUNA-CHELLAM CHETTI v. SUBRAMANIAN CHETTI.

SUITS by plaintiffs as assignees of the Raja of Ramnad to recover instalments due under an agreement executed by the defendant's father to the Raja of Ramnad on the 9th July 1895 and assigned by the Raja to the plaintiffs' father on the 9th December 1895.

The further facts of the case are fully set out in the judgment, and in the judgment of the Privy Council reported in *Subramanian Chettiar* v. *Arunachalam Chettiar*(1).

The Hon. Sir. *V. Bhashyam Ayyangar*, *V. Krishnaswami Ayyar* and *S. Srinivasa Ayyangar* for appellants.

P. R. Sundara Ayyar and *K. Srinivasa Ayyangar* for respondent.

JUDGMENT.—The parties to these appeals are the same as the parties to Original Suit No. 39 of 1897 which was concluded by the decision of the Privy Council reported in *Subramanian Chettiar* v. *Arunachalam Chettiar*(1), and the plaintiff's present claim is based on the same assignment by the late Raja of Ramnad as that on which the previous action was based.

The facts are briefly as follows :—

The Raja granted a permanent lease of a portion of his zamindari to one Ramasamy Chetty, the father of the defendants, on the 4th July 1895. In consideration of this lease the lessee by an instrument, dated the 9th July 1895, undertook to pay to the Raja Rs. 500 monthly for a period of ten years from July 1895. The Raja, by an assignment in writing, dated the 9th December 1895, transferred his rights under the instrument of the 9th July to the plaintiff's father, and notice of the assignment was given to Ramasamy Chetty on the 20th December 1895. In Original Suit No. 39 of 1897 the plaintiff eventually obtained a decree from the Privy Council for some Rs. 14,000, on account of the monthly payments which had become due under the assignment up to the 9th October 1897. The two suits out of which the present appeals arise are for the sums which became due after the 9th October 1897. Original Suit No. 60 of 1900 is for Rs. 21,330 which became due between the 9th October 1897 and the 9th September 1900. Original Suit No. 57 of 1903 is for Rs. 21,240 which became due up to the date of the suit, viz., the 25th September 1903. In these two suits defences have been raised which if well founded were equally available to the

(1) I.L.R., 25 Mad., 603 at p. 610.

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defendants in the suit of 1897, but which, for reasons which do not appear, were not then put forward.

The Subordinate Judge overruled these defences, and gave decrees for the plaintiff in both suits.

The defendants appeal, and on their behalf two main contentions are urged. The first contention urged is that the right assigned to the plaintiff by the Raja was an "actionable claim" within the meaning of the provisions of the Transfer of Property Act IV of 1882 before it was amended by Act VI of 1900, and that consequently the plaintiff is, in any event, not entitled to a decree for a sum exceeding the price paid by him on account of the assignment with such interest thereon as the Court may allow and costs of the assignment.

The lower Court disallowed this contention on the ground that at the time of the assignment no portion of the money sued for had become due. In arriving at this conclusion the Subordinate Judge followed the decision of the Full Bench reported in *Shib Lal* v. *Azmat Ullah*(1) where it was held that a claim is not actionable unless it is "a claim in respect of a cause of action which has already matured, and which, subject to procedure, may be enforced by suit."

The difficulty arising out of the language of section 130 of the Act has often been noticed, but, on the whole, we see no reason to dissent from the view expressed by the Full Bench. In addition to the reasons given in the judgment in that case we may point out that the words "likely to become necessary" in section 130 seem to point rather to a case in which, after the right of action has accrued litigation is impending, than to a remote possibility of a suit at some future time when the right to sue shall have actually matured.

Mr. Krishnaswami Ayyar for the appellants laid stress on the words "debt or other actionable claim" in the fifth clause of section 8.

We do not, however, think that this language is conclusive against the construction we have adopted. Obviously the word 'debt' in this clause cannot be taken to be used in the widest possible sense, for, if so, it would cover the case of a judgment debt which is excepted from the operation of section 135 which

(1) I.L.R., 18 All., 265.

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ARUNACHELLAM CHETTI v. SUBRAMANIAN CHETTI.

provides that "where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price" which he has paid, with incidental expenses. We think that the word 'debt' in the clause referred to should be confined to such debts as fall within the general category of actionable claims.

No inconvenience can arise from the construction, as under the terms of the section, all the legal incidents of the right transferred pass to the transferee, unless otherwise intended.

The appellants' contention, therefore, in our opinion fails, and it is unnecessary to discuss the further questions that would arise if we held that the right transferred to the plaintiff by the assignment did constitute an actionable claim.

The second main contention on behalf of the appellants is that they are entitled to set off against the plaintiff's claim the amount which is claimed as payable to them under the mortgage instrument of the 16th November 1894 executed by the Raja in favour of Ramasamy Chetty, the father of the defendants, and which was due on the date of the assignment, viz., the 9th December 1895. Mr. Sundaraiyar, on behalf of the respondent, urged that as the amount claimed to be set off was due under a transaction independent of, and unconnected with, the claim assigned to the plaintiff, the amount claimed to be set off could not legally be set off as against the assignee, although it could have been set off if the suit had been by the assignor (the Raja) himself.

This contention is negatived by the uniform course of the authorities to which our attention has been drawn by Mr. Krishnaswami Aiyar on behalf of the appellants. (See for instance cases cited in Pollock on 'Contracts,' 7th edition, pages 222 to 224). It follows therefore that the set off must be allowed unless the right has been lost for one or other of the reasons to which we shall now refer.

The first reason put forward is that Ramasamy Chetty, the mortgagee under the mortgage of the 16th November 1894, has so dealt with his mortgage interest as to render it impossible for him to reconvey to the Raja the mortgaged property as it stood at the date of the mortgage, and consequently he is debarred from relying on the Raja's personal liability to pay the debt. To understand this plea it is necessary to refer to certain transactions which took place subsequent to the mortgage of the 16th November

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1894. The Raja's liabilities having increased after that date, he executed, on the 12th July 1895, a deed of trust whereby he transferred the zamindari of Ramnad, and practically all his other property, to a trustee in trust for his son after the payment of all his debts including that due to Ramasamy under the mortgage. With a view to the better liquidation of the debts the trustee arranged to obtain a large loan from certain English capitalists who required, as a condition of their giving the loan, that they should be given a first mortgage on the zamindari. As the sum to be lent by them was not sufficient to discharge all the then debts of the Raja it was arranged that some five lakhs of the amount payable to Ramasamy Chetty, who held the first mortgage on the zamindari, should be paid to him and that his mortgage security for the remainder of the debt, some four lakhs, should, as between him and the English lenders, be held subject to a mortgage in their favour, and this agreement was carried out by the execution by Ramasamy Chetty of what is referred to as the postponement deed (exhibit V) of the 28th June 1899.

No doubt Ramasamy Chetty by this instrument placed himself in the position of a second mortgagee with reference to the English lenders, but inasmuch as the arrangement was one which it was competent to the trustee to make under the general powers conferred upon him by the trust deed of the 12th July 1895, clauses 12 and 21, and inasmuch as the evidence especially exhibits IV and V shows that the Raja was a consenting party to the arrangement, we must hold that neither he nor the person claiming through him, can plead that Ramasamy's action in the matter disentitled him from relying on the personal remedy against the Raja given to him by the mortgage. (See Coote on 'Mortgages,' 7th edition, page 981, paragraph 2, and the authorities there cited.)

The second reason put forward on behalf of the respondent seems to us to be equally unsustainable. It was argued that in consequence of the execution of the trust deed as between the trustee and the Raja, the former occupied the position of a principal debtor and the latter that of a surety, and that therefore Ramasamy Chetty, having under the instrument of the 28th December 1899, granted time to the trustee, lost his personal remedy against the Raja.

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Mr. Sundaraiyar was unable to cite any English or Indian authority which would support the view that in the circumstances of this case the relation of surety and principal debtor could properly be held to subsist between the Raja and the trustee, who never undertook any personal liability to the Raja's creditors. On the other hand, the observations in the cases to which our attention was drawn on behalf of the respondent are inconsistent with such a view (*Palmer* v. *Hendrie*(1), *Walker* v. *Jones*(2) and *Kinnaird* v. *Trollope*(3)).

The third and last reason urged for holding that Ramasamy Chetty is no longer entitled to avail himself of the personal remedy against the Raja is, in our opinion, well founded. It is that Ramasamy Chetty by his conduct gave up his right to proceed against the Raja personally. The transactions bearing upon this part of the case are exhibits D, E and F, all dated 28th September 1899. By exhibit D executed by Ramasamy Chetty to the trustee and exhibit F, executed by the trustee to Ramasamy Chetty and another the debt due to Ramasamy Chetty under the mortgage of 1894 was reduced to a sum of Rs. 2,85,000, and it was arranged that interest on that amount should be paid on specified dates until 1909, and that after that date a sum of Rs. 36,600 should be paid annually until 1922 by which time the whole debt with interest would be liquidated.

To secure the payments thus provided for a lease (exhibit E) of certain villages was executed in favour of Ramasamy Chetty and the other party to exhibit F.

The first effect of these transactions was to give Ramasamy Chetty a right to pay himself all the remaining mortgage money due under the mortgage of 1894 from a source, and in a manner, to which he had no right under his mortgage.

The period during which this liquidation was to take place was so prolonged as to make it impossible for us to believe that it was intended to keep alive the personal remedy against the Raja, and this conclusion is rendered almost certain by the language employed in paragraph 7 of exhibit D as contrasted with that of the proviso in the postponement deed (exhibit V) of the 28th June 1899.

(1) 54 Eng. Rep., 186. (2) L.R., I.P.C., 50.
(3) L.R., 39 Ch.D., 636.

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In the latter it is expressly provided that the instrument shall not operate to postpone the rights of Ramasamy Chetty under his mortgage of 1894 "to any person other than the lenders the present trustees and those claiming under them, respectively," while in the former it is provided that even in the event of failure to pay, the remedy shall be confined to the right to proceed against the hypothecated property only. It is not surprising that Ramasamy Chetty preferred to obtain possession of the villages from the income of which he could reimburse his debt rather than to retain a hold on the practically valueless personal liability of the Raja, who had denuded himself of all his property.

It was apparently owing to the consciousness that such liability had been waived, that the present plea of set off was not raised in the suit of 1897. On this ground we must hold that the set off claimed cannot be allowed.

It remains to notice one more argument of the appellant founded on the fact that the Raja's son has brought a suit (Original Suit No. 77 of 1902) to set aside the permanent lease of the 4th July 1895 on the ground that it was obtained from the Raja by undue influence and fraud. It was urged that if that suit should succeed, the defendants would be entitled to a refund of the consideration paid for it by way of the monthly payments of Rs. 500 for 120 months, and that as that would be an equity to which the Raja would be subject, his assignee (the plaintiff), would also be bound by it, and that therefore no unconditional decree should be given to him. We are unable to accede to this argument. Under sections 38 and 41 of the Specific Relief Act, I of 1877, no doubt it would be competent to the Court, if the lease should be set aside, to require the party avoiding the transaction "to make any compensation to the other which justice may require." The award of this compensation, and the amount thereof, will depend upon circumstances as they shall exist at the time of the cancellation and cancellation will only be ordered, if at all, conditionally on the compensation being duly made. It would be impossible to hold that such an equity could be relied on as a defence, or even as a temporary bar, to the present action.

The facts of the case in *Government of Newfoundland* v. *Newfoundland Railway Company*(1) on which Mr. Krishnaswami Ayyar

(1) L.R., 13 A.C., 199 at p. 212.

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strongly relied, were altogether different from those in the present case. It was pointed out in that case that "the two claims under consideration have their origin in the same portion of the same contract, where the obligations which gave rise to them are intertwined in the closest manner. The claim of the Government does not arise from any fresh transaction freely entered into by it after notice of assignment by the company. It was utterly powerless to prevent the company from inflicting injury on it by breaking the contract. It would be a lamentable thing if it were found to be the law that a party to a contract may assign a portion of it, perhaps a beneficial portion, so that the assignee shall take the benefit, wholly discharged of any counter-claim by the other party in respect of the rest of the contract which may be burdensome There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances. But their Lordships have no hesitation in saying that in this contract the claims for subsidy and for non-construction ought to be set against one another." Again in the case of *Fleming* v. *Loe*(1) also relied on by the appellants, there was a total failure of consideration which would not be the case in the present suit even if the lease were set aside inasmuch as the lessee has had the benefit of possession ever since 1895.

We therefore dismiss the appeals with costs. As regards the memoranda of objections no sufficient reason has been shown for reducing the stipulated rate of interest between the date of the plaint and of the decree. We allow the memoranda of objections with costs and modify the decrees accordingly.

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(1) (1901) 2 Ch.D., 594.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

1907.
January 7, 8.

CHIDAMBARAM CHETTI *alias* PERIAKARUPPAN CHETTI (PLAINTIFF), APPELLANT,

v.

PICHAPPA CHETTY (DEFENDANT), RESPONDENT.*

Principal and agent—Agent appointed by administrator not liable on the contract of agency to the person entitled to the estate.

An agent appointed by the administrator of an estate as such, cannot be proceeded against on such contract of agency by the person entitled to the estate, and it makes no difference that the administrator obtained the grant as the attorney of the mother and guardian of the person entitled.

A, the father of the plaintiff, died, leaving a widow B and plaintiff, his minor son. M obtained letters of administration to the estate of A as attorney for B. M as such administrator appointed P, the deceased father of defendant, his agent. P managed the estate of A for several years, during which time, it was alleged by plaintiff he had received large sums of money due to the estate and appropriated them to his own use. The plaintiff sued the defendant as the heir and representative of P for an account of the monies received by P as agent of M, and to recover from the defendant any amount that may be found due from P. The lower Court held that P was not liable to account to plaintiff, as on the evidence P was not the agent or the duly appointed sub-agent of plaintiff.

The plaintiff appealed.

The Hon. Mr. *P. S. Sivaswami Ayyar* for appellant.

V. Krishnaswami Ayyar and *S. Srinivasa Ayyangar* for respondent.

JUDGMENT.—The business was carried on on behalf of the plaintiff's father in the Straits Settlements, and on his death letters of administration in respect of his estate were obtained by Muthukaruppan Chetti as attorney of the widow of the deceased. The defendant's father was appointed to collect outstandings due

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* Appeal No. 52 of 1904, presented against the decree of M.R.Ry. W. Gopalachary, Subordinate Judge of Madura (East), in Original Suit No. 76 of 1902.

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CHIDAMBARAM CHETTI v. PICHAPPA CHETTY.

to the estate, and according to the plaint this appointment was made under exhibit G, a power of attorney granted by Muthukaruppan Chetti to the defendant's father on the 27th June 1894. Though certain letters produced on behalf of the plaintiff suggest that the defendant's father was appointed by the plaintiff's maternal uncle prior to the execution of exhibit G, that was not the case presented either in the Court below or before us. The instrument recites that Muthukaruppan Chetti was the administrator to the estate, and, so far as this case is concerned, made the appointment of the defendant's father in his capacity as such administrator and as his agent.

There can therefore be no doubt that the relation created by the instrument was one of principal and agent as between Muthukaruppan Chetti and the defendant's father. Whatever be the right of the plaintiff as the person entitled to the estate of which Muthukaruppan Chetti is administrator, it is clear that neither the defendant's father nor the defendant as his reprentative is liable to be proceeded against on the contract of agency by the plaintiff (compare *The Attorney-General* v. *Earl of Chesterfield*(1), *Maw* v. *Pearson*(2)); Lewin's 'Law of Trusts' (10th edition, pages 759 and 760). The circumstance that Muthukaruppan Chetti obtained letters of administration as attorney of the plaintiff's mother does not, in our opinion, render the principle laid down in these authorities inapplicable to this case.

No claim is made against the defendant on the ground of his possession of property belonging to the plaintiff. The suit is purely and entirely based upon the contract of agency, and therefore is, in our opinion, not sustainable.

In this view it is unnecessary to consider the other points raised and argued at length on both sides.

We dismiss the appeal with costs.

(1) 52 Eng. Rep., 234. (2) 54 Eng. Rep., 340.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Wallis.

KUTHAPERUMAL RAJALI (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL THROUGH THE COLLECTOR OF TANJORE AND ANOTHER (DEFENDANTS NOS. 1 AND 3), RESPONDENTS.*

1906. December 10, 19.

Benamidar, right of to bring suit—Can sue only if he can show some right under general law—Benamidar, merely as such, not a trustee—Limitation Act XV of 1877, sched. II, art. 149, applies only to suits brought by or on behalf of the Secretary of State.

A person in whose name property is purchased *benami* cannot sue in his own name unless he can show some right under the general law to maintain the suit as for instance as trustee or agent of an undisclosed principal. In *benami* sales, the legal estate does not in all cases rest in the benamidar, and constitute him a trustee for the real owner. Article 149 of schedule II of the Limitation Act applies only to suits brought by the Secretary of State or on his behalf, and not to suits brought by persons deriving title from him.

THE first defendant, the Secretary of State, sold by auction certain lands described as Government poramboke, and the plaintiff became purchaser. The sale was confirmed on 23rd November 1898. The lands at the time of sale, and for more than 12 years prior to the sale were admittedly in the enjoyment of the defendants Nos. 2 to 4. They were also in possession subsequent to the sale. Plaintiff sued to recover the possession of the lands from defendants Nos. 2 to 4.

The defendants *inter alia* contended that plaintiff was only a benamidar for one *A* and was not entitled to sue in his own name, and that as they were in possession for more than 12 years, the suit was barred by limitation.

Both the issues were decided against plaintiff and the suit was dismissed. The decree was confirmed on appeal.

The contention that the plaintiff had 60 years under schedule II, article 149 of the Limitation Act was set up, but was decided against the plaintiff by both the Courts.

Plaintiff appealed.

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* Second Appeal No. 661 of 1904, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 567 of 1903, presented against the decree of M.R.Ry. S. Authynarayana Ayyar, District Munsif of Valangiman, in Original Suit No. 291 of 1901.

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KUTHA-PERUMAL RAJALI v. THE SECRETARY OF STATE FOR INDIA.

A. S. Balasubramanya Aiyar for appellant.

The Government Pleader for first respondent.

V. Krishnswami Ayyar and *S. Srinivasa Ayyar* for second respondent.

JUDGMENT.—This is a suit brought by the plaintiff to recover from the second, third and fourth defendants possession of certain lands which were sold in public auction by Government, the first defendant, and purchased in the name of the plaintiff.

Both the lower Courts have found that the plaintiff was a mere benamidar for one Rangasami and have dismissed the suit on the ground that as such he was not entitled to sue. They have also held the suit barred by limitation. We agree with the decision arrived at on both grounds. As to the first point, the lower Courts appear to have proceeded mainly on the authority of the following observation in *Bojjamma* v. *Venkataramayya*(1). "No doubt it has been often held in suits relating to land that a benamidar is not entitled to sue." That was a case in which a benamidar was held entitled to sue on a negotiable instrument, and the observation above quoted was merely an *obiter dictum* and is not in our opinion a correct statement of the principle applicable. The question whether a benamidar should be allowed to sue or not cannot, in our opinion, be made to depend upon the question whether the subject-matter of the suit is land or not, but must depend upon his showing whether the facts of the case are such as to give him some right to sue under the general law. For instance, it may be shown that the facts are such as to entitle him, on the principle embodied in section 230, Indian Contract Act, to sue as agent of an undisclosed principal on a contract made by him, or again the facts may be such as to constitute him a trustee for the real owner and to entitle him to sue under section 437, Civil Procedure Code. But where the facts do not show any title to sue under the general law, as in the present case where a benamidar in whose name lands were purchased sues not on the contract of sale, but to recover possession from persons who were not parties to the contract, and fails to prove on the facts that the lands became vested in him as trustee for the real owner, the mere fact that the lands were purchased in his name will not, in our opinion, entitle him to maintain a suit. Coming now to the authorities the decisions

(1) I.L.R., 21 Mad., 30.

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of this Court to which we have been referred appear to be in accordance with the principles to which we have referred. In *Chinnan* v. *Ramachandra*(1) a puisne mortgagee who was found to be a mere benamidar was held not entitled to maintain a suit against the prior mortgagee and others to redeem the prior mortgage. *Shangara* v. *Krishnan*(2) merely decides that, where a benamidar sues with the knowledge of the true owner and the suit is dismissed on the merits the true owner is bound by the decree. The case of *Bojjamma* v. *Venkatramayya*(3), as already stated, was a suit on a negotiable instrument and the grounds on which the decision allowing the benamidar to sue should be supported have recently been considered in this Court. The decision in *Chidambara Mandaroyan* v. *Singaram*(4), in which a benamidar mortgagee was allowed to sue for the recovery of the mortgage money and sale in default may, in our opinion, be supported on the ground that he was entitled to sue on the contract as agent of an undisclosed principal, even if the facts were not such as to entitle him to sue as trustee.

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As regards the other High Courts, the Calcutta decisions against the right of a benamidar to sue in *Prosunno Coomar Roy Chowdhry* v. *Gooroo Churn Sein*(5), *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar*(6), *Issur Chandra Dutt* v. *Gopal Chandra Das*(7), *Baroda Sundari Ghose* v. *Dino Bandlu Khan*(8) and *Mohendra Nath Mookerjee* v. *Kali Proshad Johuri*(9), in the last of which all the previous authorities were reviewed, are all cases in which the benamidar failed to show any right to sue under the general law and appear to us to be entirely in accordance with the principles we have applied to the decision of the present case.

The leading authority opposed to this view is *Nand Kishore Lal* v. *Ahmad Ata*(10). The decision in that case that a benamidar is entitled to sue for land in his own name is based on the view that the legal estate is vested in him. Where the legal estate is vested in the benamidar, he is in fact a trustee and as such entitled to sue, but we do not think that the effect of a purchase of land benami according to the practice in this country is in all cases to vest the legal estate in the benamidar and

(1) I.L.R., 15 Mad., 54.
(2) I.L.R., 15 Mad., 267.
(3) I.L.R., 21 Mad., 30.
(4) S.A. No. 186 of 1903 (unreported).
(5) 3 W.R., 159.
(6) I.L.R., 16 Calc., 364.
(7) I.L.R., 25 Calc., 98.
(8) I.L.R., 25 Calc., 874.
(9) I.L.R., 30 Calc., 265.
(10) I.L.R., 18 All., 69.

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constitute him a trustee. For instance where, as often happens, land is purchased benami in the name of an infant son it seems impossible to hold that the land is vested in him as trustee. In the present case it is found that the benamidar was a peon in the service of the real purchaser, and we do not think that the mere fact that he bid at the auction, and that the grant was made by Government in his name made him a trustee so as to entitle him to sue.

We are also of opinion that the suit was rightly dismissed as barred by limitation. It is not a suit brought by, or on behalf of, the Secretary of State and the plaintiff is not entitled to the enhanced period provided by article 149 of the Limitation Act merely because he derives his title by purchase from Government (*The Municipal Commissioners* v. *Sarangapani Mudaliar*(1), *Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari Debi*(2) and *Pullanappally Sankaran Nambudri* v. *Vittil Thalakat Muhamod*(3)).

The second appeal is dismissed with costs of the second respondent. The first respondent will bear his own costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1906. December 6, 7.

RAMANASARI (PLAINTIFF), APPELLANT,

v.

MUTHUSAMI NAIK (FIRST DEFENDANT), RESPONDENT.*

Limitation Act XV of 1877, *art.* 91—*Does not apply to defendants in possession—Madras Rent Recovery Act VIII of* 1865, *section* 18—*Seven days required by the section means seven clear days.*

A defendant in possession is not precluded from setting up the invalidity of a sale, because his right to have it set aside, was barred at the date of suit by article 91 of schedule II to the Limitation Act.

The seven days which, in fixing the day of sale under section 18 of the Rent Recovery Act, must be allowed from the time of notice, are seven whole days, and

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(1) I.L.R., 19 Mad., 154. (2) L.R., 31 I.A., 203 at p. 207.
(3) I.L.R., 28 Mad., 505.

* Second Appeal No. 719 of 1904, presented against the decree of M.R.Ry. W. Gopalachariar, Subordinate Judge of Madura (East), in Appeal Suit No. 292 of 1903, presented against the decree of M.R.Ry. T. A. Ramakrishna Ayyar, District Munsif of Periyakulam, in Original Suit No. 47 of 1903.

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not seven periods of 24 hours calculated from the hour of the day on which the notice was issued. RAMANASARI v. MUTHUSAMI NAIK.

McQueen v. *Jackson*, ([1903], 2 K.B., 163), referred to.

SUIT by plaintiff to recover possession of lands belonging to first defendant purchased by plaintiff at a sale held under Act VIII of 1865 for arrears of rent due by first defendant. The notice of sale was issued on the 6th February 1901 and the sale was held on the 13th. The defendant objected to the validity of the sale, but his objection was disallowed and a decree given for plaintiff.

On appeal this decree was reversed and the suit was dismissed. The material portion of the appellate judgment was as follows:—

"Section 40 requires that the sale 'shall be conducted under the rules laid down for the sale of moveable property.' Section 18 requires that, in fixing the day of sale, not less than seven days must be allowed 'from the time of the public notice and not less than 30 days from the date of distraint.' In the present case, the sale was held on the 13th February, but the notice was published on 6th February according to the copy of sale notice which was produced in the lower Court by plaintiff but which was not filed. This is now marked exhibit III. Under the General Clauses Act, section 10, 6th February has to be excluded from the period and it follows that there were not seven days between the time of notice and date of sale.

The Full Bench ruling in *Lala Mobaruk Lal* v. *The Secretary of State for India*(1), cited by appellant's pleader supports his contention. The case arose under a Bengal Act, but the wording of section 6 was similar and it was held that non-compliance with the provisions of the Act was not a mere irregularity, but that the sale was null and void, because there was no sale under the Act. In the present case, the evidence discloses that the property was worth not less than Rs. 100 or Rs. 150 according to plaintiff, and not less than Rs. 500 according to plaintiff's third witness, but it fetched only Rs. 19 in the sale."

Plaintiff appealed.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for appellant.

T. R. Venkatarama Sastri for the Hon. Mr. *P. S. Sivaswami Ayyar* for respondent.

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(1) I.L.R., 11 Calc., 200.

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RAMANASARI v. MUTHUSAMI NAIK.

JUDGMENT.—The first point taken on behalf of the appellant was that the defendant was not entitled to set up the defence that the sale to the appellant was bad since he (the defendant) had not applied to have the sale set aside, and an application to set aside the sale would have been, at the date of the suit, barred by limitation. As to this, the defendant was in possession and the plaintiff who sued to oust him could only succeed, as the Subordinate Judge pointed out, on the strength of his own title. It was for him (the plaintiff) to establish, affirmatively, the validity of the sale on which his title depended.

The second point was that the sale was not bad since in computing the not less than seven days which, in fixing the day of sale under section 18 of the Rent Recovery Act, must be allowed from the time of the public notice, one, if not both, of the 'terminal' days may be included. It was argued that day of sale meant day, and that *time* of the public notice meant hour of the day, and that seven periods of 24 hours were to be computed from the hour of the day on which the notice was published. We do not think that the section can be so construed, and for the purpose of computing the time, we do not think any distinction can be drawn between 'day' and 'time.' 'Not less than' means the same as 'clear' and seven whole days must elapse between the day of the notice and the day fixed for sale. We think the same construction must be placed on the words 'not less than' in section 18 of the Rent Recovery Act as was placed on the words in the enactment under consideration in *McQueen* v. *Jackson*(1).

Even if we could adopt the appellant's contention that 'time' meant hour of the day, we should be disposed to hold that the time would have to be computed by excluding the day on which notice was published and the day on which the sale was fixed to take place. This second appeal is dismissed with costs.

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(1) (1903), 2 K.B., 163.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

VEERAPPA KAVUNDAN (PLAINTIFF), APPELLANT,

1907.
January 22.
February 5.

v.

RAMASAMI KAVUNDAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Evidence Act, I of 1872, s. 68—Attesting witness, if available must be called to prove a mortgage bond even if object is only to enforce the personal covenant.

Where one of the witnesses who have attested a mortgage bond is available, the execution of such bond cannot, under section 68 of the Evidence Act, be proved otherwise than by the evidence of such witness, even when the object of proving such execution has reference only to a personal covenant to pay, which is severable from the security created by the bond.

SUIT to recover money due on a hypothecation bond. The first defendant denied the genuineness of the bond. One of the attesting witnesses was alive. The plaintiff not having taken proper steps to procure his attendance, the Munsif dismissed the suit on the ground that the document was not proved according to law. This decision was confirmed by the District Court.

The plaintiff appealed.

S. Srinivasa Ayyar for *V. Krishnaswami Ayyar* for appellant.

Rangaswami Ayyangar for *K. Srinivasa Ayyangar* for first and second respondents.

JUDGMENT.—There can be no doubt that the appellant omitted to take proper steps to cause the attendance of the only available attesting witness to the document on which the suit was brought. No objection has been raised to the view on which the lower Courts proceeded, viz., that the document is a mortgage, containing, however, a personal covenant to pay the debt. It was contended on his behalf that section 68 of the Indian Evidence Act with reference to which the lower Courts held that the execution of the document could not be proved, did not preclude its being received in evidence for the purpose of enforcing the personal covenant, but the language of the section does not admit

* Second Appeal No. 642 of 1904, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 906 of 1903, presented against the decree of M.R.Ry. J. Sundaranana Rao, District Munsif of Tiruturaippundi, in Original Suit No. 163 of 1902.

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VEERAPPA KAVUNDAN v. RAMASAMI KAVUNDAN.

of any such distinction being drawn. What the section prohibits is the proof of *execution* of the document otherwise than by the evidence of an attesting witness if available, and it is impossible to view the question of execution with reference to the covenant to pay as severable from the execution of the document in so far as it creates the security. In *Manners* v. *Postan*(1), Lord Alvanley referring to the English rule analagous to that embodied in section 68, laid down that it was not confined to cases where the instrument in question was the ground of the action, and that it applied where the instrument was used in evidence collaterally. On the same principle in *R.* v. *Jones*(2), it was held that on an indictment against an apprentice for enlisting as a soldier the indenture must be proved by the subscribing witness, citing these cases, Taylor enunciates the law thus :—

"The rule that, where an attesting witness *is* necessary to the validity of an instrument, a person who was such witness must be called, applies, whatever the purpose for which the instrument is produced" (Taylor on 'Evidence,' 9th edn., vol. II, p. 1209).

The observation in *Madras Deposits and Benefit Society Limited v. Oonnamalai Ammal*(3) to which our attention was called though it is in favour of the same conclusion should not be understood as here relied on for the purpose, for the instrument there was not attested at all and the section of the Evidence Act on which the present question turns, obviously applies only to case where an instrument required by law to be attested, bears the necessary attestation. Clearly where the requisite attestation is wanting that involves a question exclusively as to the validity of the transaction, whereas when an attesting witness who ought to have been called has not been called that raises a question exclusively as to proof and admissibility.

The second appeal therefore fails and is dismissed with costs.

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(1) 4 Esp., 241. (2) 1 Leach, C.C., 174.
(3) I.L.R., 18 Mad., 29.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

LAKSHMINARAYANA REDDI (DEFENDANT), APPELLANT IN ALL CASES,

1907. January 22.

v.

GURUSAWMI UDAYAN (PLAINTIFF), RESPONDENT.*

Landlord and tenant—When patta once tendered and accepted, landlord cannot tender a second patta and enforce the terms of such second patta.

When a patta has been tendered by the landlord and the tenant accepting such patta has executed a muchilika, the result is an agreement binding on the parties for the period to which the instruments relate, so long as they are in force; and the landlord cannot during such period tender a second patta and proceed for the rent claimed to be due under such second patta.

Krishna Doss Bala Mukunda Doss v. *Guruva Reddi*, (9 M.L.J., 183), distinguished.

Arunachellam Chetti v. *Ganapathi Aiyya*, (I.L.R., 28 Mad., 379), distinguished.

SUIT filed by one of the tenants of the mitta or proprietary village of Alagianatham under section 40 of the Madras Rent Recovery Act, VIII of 1865, appealing against the notices of attachment and sale served on him under section 39 of the said Act by the defendant.

The village in question came by purchase into the possession of the present defendant on the 12th December 1902. Fifteen days afterwards he executed pattas to and obtained muchilikas from the present plaintiff and certain others.

In June 1903 the defendant discovered that there were some clerical errors in the pattas issued by him. He prepared revised pattas and is said to have served them on his tenant. The service was denied. The defendant thereupon gave his notice of attachment and sale of his lands under section 39 of the Act. Hence the present suit.

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* Second Appeals Nos. 773 to 778, 780, 782 and 783 of 1905, presented against the decrees of A. C. Tate, Esq., District Judge of South Arcot, in Appeal Suits Nos. 107 to 112, 114, 116 and 117 of 1904, presented against the decisions of M.R.Ry. P. Narayana Menon, Head-quarters Deputy Collector of Cuddalore, in Summary Suits Nos. 16 to 20, 22, 25, 28 and 39 of 1903 respectively.

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LAKSHMI-NARAYANA REDDI v. GURUSAWMI UDAYAN.

The Deputy Collector decreed for plaintiff, and this decree was confirmed on appeal.

The defendant preferred this second appeal.

T. V. Seshagiri Ayyar for appellant.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for respondents.

JUDGMENT.—We agree with the District Judge in holding that, in the circumstances of these cases, it was not competent to the landholder to proceed for the rent claimed to be due under the second pattas tendered by him subsequent to the acceptance by the tenant of the pattas first tendered and in respect of which he had obtained muchilikas from the tenants. The case of *Krishna Doss Bala Mukunda Doss* v. *Garuva Reddi*(1) and the case of *Arunachellam Chetti* v. *Ganapathi Ayya*(2) are distinguishable inasmuch as in them the pattas tendered first had not been accepted. No doubt the tender of a patta or the tender by a tenant of a muchilika is not an offer in the wider sense of an offer under the law of Contracts. There is the pre-existing relation of landlord and tenant, with reference to which the law imposes the duty of exchanging pattas and muchilikas.

In this view, therefore, the tender of a patta is no doubt the offer to perform an obligation already attaching to a landholder, but when the patta has been tendered and accepted and a muchilika executed, the result is an agreement binding upon the parties for the period to which the instruments relate, so long as they are in force.

The suggestion that, even after tender and acceptance of a patta, it is competent to either party to depart from his engagement on the ground that it does not record properly the terms of the tenancy is obviously untenable.

The term 'engagement,' which occurs in section 3 of the Act, is sufficient of itself to show this. Further, sections 8 and 9 provide a right of suit only in cases when the offer has not been accepted by the other party, and section 72 is practically conclusive on the point inasmuch as it gives to a judgment settling the terms of a tenancy the same efficacy which attaches to a muchilika.

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(1) 9 M.L.J., 183. (2) I.L.R., 28 Mad., 379.

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The distraint, therefore, for rent, which was not agreed to be paid with reference to the muchilika executed by the tenant, was bad.

On this ground we dismiss these second appeals.

LAKSHMI-NARAYANA REDDI v. GURUSAWMI UDAYAN.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1906. November 8. 1907. January 18, 21. February 6, 14.

RAMASAMI NAIK (SECOND DEFENDANT—RESPONDENT), APPELLANT,

v.

RAMASAMI CHETTI AND OTHERS (PETITIONERS, DECREE-HOLDERS, LEGAL REPRESENTATIVES AND DEFENDANTS NOS. 3 TO 7, AND NINTH DEFENDANT'S LEGAL REPRESENTATIVES), RESPONDENTS.*

Transfer of Property Act, Act IV of 1882, *s.* 6 (*a*)—*Transfer of bare expectancy by mortgagor or by consent decree void*—Res judicata *in execution proceedings—Order passed after notice no* res judicata *when notice silent as to prayers claimed—Receiver, continuation, of by Appellate Court—Amendment of execution petition, power of Court to allow.*

A, the owner of an impartible and inalienable Zamindari, which passed on the death of the owner for the time being, who had only a life estate, to the senior male member of the family mortgaged it to B in 1892 without possession. Four male members of the family C, D, E, F, who were in the line of heirs joined A in executing the mortgage. Subsequently some usufructuary mortgages were executed to B, and B was in possession of the zamindari. In 1894, Original Suit No. 43 of 1894 was brought by B against A, C, D, E, F, and others to recover the amount due under the mortgage of 1892. A consent decree was passed making defendants A, C, D, E, F, liable for the amount and directing that in case the amount was not recovered in the life-time of A, it should be recovered from the other defendants when they succeeded to the estate and the zamindari was made liable for the decree amount. A died in 1904. He was succeeded by one not a party to the suit and on the latter's death in 1905, C succeeded as Zamindar.

In 1899 and 1903 two applications for execution by sale of the *whole zamindari* were put in by B and were granted after notice served on C. The notices however only stated that application was made for execution of the decree but the reliefs asked for were not stated.

* Civil Miscellaneous Appeal No. 152 of 1905, presented against the order of M.R.Ry. V. Swaminatha Ayyar, Subordinate Judge of Madura (West), in Execution Petition Register No. 62 of 1905 (Original Suit No. 43 of 1894).

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RAMASAMI NAIK *v.* RAMASAMI CHETTI.

A applied again for execution in 1905. The prayer was for sale of the zamindari and for the appointment of a Receiver but the prayer for sale was given up at the trial. C raised various objections which were overruled and the Sub-Judge appointed a Receiver to take charge of the zamindari and its appurtenances. C appealed :

Held, on appeal, that C in 1892 was not a dormant co-owner with A in the zamindari and that the mortgage by C of his right in the zamin in 1892 was a transfer of a bare expectancy and was a nullity under section 6 (*a*) of the Transfer of Property Act. The prohibition in section 6 (*a*) of the Transfer of Property Act is based on principles of public policy, and the Court cannot allow such transactions to be effected by a consent decree.

Lakshmanaswami Naidu v. *Rengamma*, (I.L.R., 26 Mad., 31), referred to.

The principles of equity, on which English Courts grant relief in such cases when the property actually vests cannot be given effect to in the face of express prohibition contained in section 6 (*a*) of the Transfer of Property Act.

An order passed in execution proceedings will be *res judicata* only when the notice gives sufficient intimation of the reliefs prayed for.

Narayana Pattar v. *Gopalakrishna Pattar*, (I.L.R., 28 Mad., 355), followed :

Held further, that as the Receiver was validly appointed on the ground that the property was the subject-matter of the suit, the Appellate Court had jurisdiction to maintain him as a means of realising the amount from the judgment-debtor personally and the property must be considered under attachment, though not attached under section 274 of the Code of Civil Procedure.

Amounts realised by a usufructuary mortgagee in possession after decree for sale cannot be applied in satisfaction of the decree amount unless certified under section 258 of the Code of Civil Procedure :

Held also, that under the circumstances of the case the decree-holder may be considered to have applied for the enforcement of the decree against C personally and the order of the lower Court upheld on that ground.

Amendment of petition by inserting a prayer for execution against C personally allowed.

THE decree in this suit was passed on a compromise between the original plaintiff and the defendants Nos. 1 to 5. The basis of this compromise decree was a hypothecation bond, dated the 6th October 1892, executed by the defendants Nos. 1 to 5 on the security of the zamindari of Ammayanayakkanur and of a decree debt referred to therein. The zamindari of Ammayanayakkanur has been held to be an impartible and inalienable zamindari, the right of succession to it not being governed by the ordinary rule of *primogeniture* under the Hindu Law, but by a custom of what is called "Dayadi Pattam" according to which the person entitled to succeed on the death of a Palayagar is the senior in age of his dayadis descended from the original founder. The first defendant was the zamindar of Ammayanayakkanur at the date of the decree and the defendants Nos. 2 to 5 were among the group of dayadis who

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were entitled to the succession to the zamindari. The first defendant died in January 1904; and one Arumugasami Naik who was not a party to the mortgage bond or the consent decree in this suit became the next Zamindar in succession to the first defendant and he died in May 1905. The second defendant succeeded Arumugasami Naik and is the present zamindar of Ammayanayakkanur. The zamindari being impartible and inalienable, the zamindar, for the time being, has only a "life-interest" in it. The defendants Nos. 1 to 3 have executed a usufructuary mortgage in favour of the original plaintiff herein and two others and a further usufructuary mortage was executed on the 26th November 1897 by the defendants Nos. 1 to 4 in favour of the first petitioner herein and two others.

The further facts are sufficiently stated in the judgment.

The Sub-Judge overruling the various contentions of the second defendant appointed a Receiver to be in charge of the zamindari.

The second defendant appealed.

C. Sankaran Nair, *T. R. Ramachandra Ayyar*, *T. R. Krishnaswami Ayyar* and *G. S. Ramachandra Ayyar* for appellants.

S. Srinivasa Ayyangar for respondents.

JUDGMENT.—This is an appeal from an order of the Subordinate Judge of Madura West in an execution petition against defendants Nos. 2 to 5 in the suit praying for the sale of mortgaged property and the appointment of a receiver pending sale. At the hearing, the petition for sale was not pressed and a receiver was appointed until further order. The decree sought to be executed was a consent decree made in a suit instituted under section 67 of the Transfer of Property Act for sale of the mortgaged property against five defendants, the then Zamindar of Ammayanaikanoor and four members of his family who stood in the line of succession to the Zamindari. The plaintiff had advanced money to enable the defendants to contest an alienation of the entire Zamindari made by the preceding Zamindar in favour of his wife, and these advances had been secured by the suit mortgage, dated the 6th October 1892, by which the whole Zamindari and also a decree debt were mortgaged to the plaintiff. Subsequently the mortgagee instituted Original Suit No. 43 of 1894 against the five mortgagors and five others to recover the mortgage money from the mortgagors by sale of the Zamindari subject to the prior lien of the sixth, seventh and eighth defendants and also by sale of the decree debt. The ninth defendant was

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made a party as having obtained a decree for sale of the Zamindari against the mortgagors defendants Nos. 1 to 5. After the institution of the suit and before the date of the consent decree the High Court gave judgment in the litigation between the mortgagors and the widow of the previous Zamindar holding that this Zamindari was not only impartible, but also subject to a custom of inalienability which precluded the Zamindar for the time being from making any alienation to enure beyond his own life-time. The result of this decision which is reported as *Sivasubramania Naicker* v. *Krishnammal*(1) is that successive Zamindars only take an estate for life in the Zamindari, and that the succession passes to the senior male member of the family for the time being according to the custom known as *dayadi Pattam*. The consent decree now in question was passed on the 15th March 1895 shortly after this decision, the effect of which was to bring into prominence certain difficulties in the way of obtaining the relief sought in the present suit by sale of the Zamindari. The first defendant was the Zamindar then in possession, but the member of the family next in succession who subsequently succeeded had not joined in the mortgage and was not a party to the suit which could not affect his interest. As for defendants Nos. 3 to 5 they had, as will be seen, a mere chance of succession which was incapable of transfer under the Transfer of Property Act, and even if transferable would be likely to fetch very little. All these circumstances must be borne in mind in interpreting the consent decree which it is now sought to execute. The decree recites that the plaintiff and his vakil and defendants Nos. 1 to 5 and their vakil having presented the annexed razinamah and there being nothing in it prejudicial to the interests of defendants Nos. 6 to 10 (the other incumbrancers) the Court resolves to make a decree in accordance with its terms. The razinamah fixes the amount due for principal, interest and costs up to date at Rs. 87,000, and provides that it shall be paid off by instalments, that in default defendants Nos. 1 to 5 shall pay the balance outstanding, that the mortgaged property including the Zamindari then in possession of the first defendant and to which the other defendants are entitled shall stand liable, and that in default the plaintiff shall be at liberty to proceed against and realize the said

(1) I.L.R., 18 Mad., 287 at p. 291.

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amount with interest as provided in the decree by precept of Court from defendants Nos. 1 to 5 and the mortgage properties described below. The decree goes on to provide that if the razinamah amount should not be paid off in the life-time of the first defendant, and he should be succeeded by a person who was not a party to the suit, and such successor should object to pay the balance, the balance with interest should be paid by whichever of defendants Nos. 2 to 5 should succeed to the Zamindari at whatever period as soon as he should so succeed, and that in default the plaintiff should be at liberty to proceed against the remaining defendants in accordance with law, and that until the whole amount should be realized the mortgaged properties and defendants Nos. 1 to 5 should stand liable. These last provisions as to the event of the razinamah amount not being paid in the life-time of the first defendant were in our opinion inserted with the object, among others, of keeping alive the right to execute the decree against defendants Nos. 2 to 5 in the event of none of them succeeding until further execution would but for these provisions have become impossible.

Various objections have been taken to the present application for execution by sale of the Zamindari. In the first place it is said there is no decree for sale and that the decree is only declaratory. On the other side it is contended that the provision for realizing the decree amount by precept of Court from defendants Nos. 1 to 5 and from the mortgaged properties is in effect a decree for sale against defendants Nos. 1 to 5 and the omission to mention sale directly is ascribed to adherence to the old form of mortgage decree in use in the mofussil before the Transfer of Property Act. We are not disposed to accept this explanation and think it much more likely that this form of decree was deliberately adopted by the advisers of the parties who were in a position to obtain the best legal advice as on the whole the best means of meeting the difficulties in the way of enforcing the mortgage which we have already pointed out. Viewing the decree in this light we have no doubt that it was intended to provide for the realization of the mortgage debt in execution in the most effective manner which the circumstances permitted. The words " realize by precept of Court from the mortgaged properties " in our opinion include a power to sell the Zamindari so far as it might lawfully be sold, and therefore

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clearly a power to sell in default the life interest of the first defendant the Zamindar then in possession. The circumstances that no provision is contained in the razinamah as to the rights of the other mortgagees mentioned in the plaint, the declaration in the decree that they are not affected, and the fact that subsequently to the consent decree the mortgagees took three subsequent mortgages of the zamindari from defendents Nos. 1 to 5 do not, in our opinion, show as was contended, that the decree contains no order for sale. It may be however, that, as all that could be sold with certainty during the life-time of the first defendant was his interest in the zamindari it was contemplated that the decree-holder would not be anxious to proceed to sale but would be content with the appointment of a Receiver as on the present occasion. As to the successive life interests of the other defendants in the zamindari, we are of opinion that the decree does not give any power to sell such life interests until they take effect in possession. It is a sound rule that decrees should be construed so far as possible as being in accordance with law, and we are not prepared to hold that the general words above referred to can be read as directing a sale during the life-time of the first defendant of the interests of the other defendants which, in our opinion, as will appear later, were then mere possibilities of succession. The latter part of the decree which declares that each of these defendants shall be personally liable as from the date of his succession and that until realization the zamindari shall stand liable also supports this construction, and must we think, when read with the rest of the decree be taken as an order for sale of the life interest of each of these defendants after his succession. The validity of such a provision will be considered later.

It will be convenient first to dispose of the objection that a decree to this effect is invalid as opposed to the provision of the Transfer of Property Act regarding mortgage decrees. As already pointed out this was a decree made in a suit for sale and so not obnoxious to the provisions of section 99 of the Transfer of Property Act, and in it the amount due for principal, interest and costs is ascertained and constitutes the decree amount. The other departures from the ordinary form of decree as provided for by the Transfer of Property Act as regards date of payment and interest are in our opinion such as it was open to the parties to consent to. These objections therefore in our opinion fail.

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We now come to the most serious objection urged by the appellant. It is said that by the suit mortgage and the consent decree the second to the fifth defendants purport to transfer only their chance of succeeding to the zamindari, and that such a chance or mere possibility is incapable of transfer in India by virtue of section 6 (*a*) of the Transfer of Property Act. As pointed out by Muttusami Ayyar, J. (*Sivasubramania Naiker* v. *Krishnammal*(1)) in the case of this zamindari the interest to which each zamindar succeeds is his separate property and consists of his right to the income of the zamindari as beneficial owner for life. This is the interest which defendants Nos. 2 to 5 have sought to transfer by the mortgage and the consent decree. At the dates of mortgage and decree they had a mere chance of succeeding to this interest dependent in the case of each upon his surviving all the male members of the family older than himself so as to make him for the time being the oldest member. As in the case of an heir apparent in England they were, each of them, bound to succeed if they lived long enough, but it was a mere chance whether they would or not. In opposition to this view arguments were addressed to us based on an alleged dormant co-ownership of the zamindari by all the male members of the family in conjunction with the Zamindar for the time being. The existence of such dormant co-ownership was negatived in the case of ordinary impartible zamindaries in the well-known case of *Sartaj Kuari* v. *Deoraj Kuari*(2), where it was held that restrictions on the power of a Zamindar to alienate beyond his own life-time could not be deduced from a dormant co-ownership of all the members of the family, but must rest on special custom. Here the special custom has been proved, but the fact that the Zamindar is restrained by special custom from alienating beyond his own life-time does not in our opinion prove that the other members of the family are dormant co-owners with him of the zamindari and this is not the effect of the decision in *Sivasubramania Naicker* v. *Krishnammal*(1). Even if they were, the interest which defendants Nos. 2 to 5 have purported to transfer would, in our opinion, be none the less in the nature of a mere chance of succession.

We were asked to regard each of the male members of this family as having a life estate in the zamindari vested in him at

(1) I.L.R., 18 Mad., 287, at p. 291. (2) I.L.R., 10 All., 272.

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birth subject to prior life estates of the like nature vested in the members senior to him, and it was said that in English real property law where a life estate is conveyed to A subject to prior life estates in B, C and D, A is regarded as having a vested remainder even though if he dies before B, C or D it will never take effect in possession. We do not think that the members of this family can be regarded as taking life estates of the nature indicated, and even if they could, we do not think this rule of English real property law above referred to embodies a principle of general jurisprudence applicable to the construction of section 6 (*a*) of the Transfer of Property Act. It is a highly technical and artificial rule and has been explained by learned writers as due to special circumstances shaping the development of this branch of law in England. We are of opinion that what defendants Nos. 2 to 5 purported to transfer were mere possibilities of succession with the prohibition in section 6 (*a*) of the Transfer of Property Act.

It is next contended that even supposing the mortgage by defendants Nos. 2 to 5 to be invalid under section 6 (*a*) of the Transfer of Property Act, now that the second defendant has succeeded to the zamindari equity will give effect to it as against him and we have been referred to well known English authorities summarised in White and Tudor's 'Leading Cases,' page 107 (7th edition). We are unable to accept this contention. If the framers of the Indian Statute had intended that transfers forbidden by section 6 (*a*) should take effect against the transferors whenever they succeeded to the estate, they would have inserted a provision to this effect as they have in section 43 in the case of persons erroneously representing that they are authorised to transfer immoveable property. It has not been contended that the second defendant comes within the provisions of that section, and we see no ground on which a similar rule can be applied to cases under section 6 (*a*). *Equitas sequitur legem*, and we do not think that we are at liberty to limit the operation of the express provisions of section 6 (*a*) in the manner suggested. The contention now raised has recently been rejected in Bombay in *Sumsuddin* v. *Abdul*(1) with which we entirely concur.

It is further urged that the defendants cannot go behind the decree. If, however, the mortgage did not operate as a transfer of

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(1) 8 Bom. L.R., 781.

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interests of defendants Nos. 2 to 5 neither could the consent decree in the circumstances of the present case. Such a decree does not involve any adjudication by the Court as to the rights of the parties, and cannot empower parties to do what they are otherwise prohibited from doing. *Great North-west Central Railway Company* v. *Charlebois*(1), *Krishna Bai* v. *Hari Govind Kulkarni*(2). Section 6 (*a*) of the Transfer of Property Act in our opinion renders certain transfers unlawful obviously on grounds of public policy, and the Court cannot allow them to be effected by means of consent decrees (*Lakshmanasawmi Naidu* v. *Rangamma*(3)). In our opinion it is open to defendants Nos. 2 to 5 to oppose the execution of the decree on this ground.

It is then said that however this may be the right to have the decree executed by sale of the zamindari is *res judicata* by virtue of two prior orders for sale made by the Court during the life time of the first defendant on notice to all the defendants. In the first notice the defendants were called upon to show cause why execution should not be granted, and in the second, why the settlement of the sale proclamation should not be proceeded with. If the liability of the interests of defendants Nos. 2 to 5 to be sold can be held to have been adjudicated on by these two orders made during the life-time of the first defendant upon due notice to them, then the question is concluded (*Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry*(4)). This of course is when the orders have been made on due notice. When, however, it is endeavoured to obtain in execution something not granted by the decree, mere notice to the defendant that further execution is to be applied for, will not be sufficient to make the order *res judicata* against him (*Sheik Budan* v. *Ramchandra Bhunjgaya*(5)). And where the application is not for the execution of something which has been directed to be done by any decree or order so as *ipso facto* to carry information as to what the claim made and the relief prayed for are, notice to the judgment-debtor without inserting the specific prayers will not render the order made upon such application *res judicata* (*Narayana Pattar* v. *Gopalakrishna Pattar*(6)). As in our opinion the decree did not order the sale of the interests of

(1) (1889), A.C., 114.
(2) 8 Bom. L.R., 813.
(3) I.L.R., 26 Mad., 31.
(4) L.R., 8 I.A., 123.
(5) I.L.R., 11 Bom., 537.
(6) I.L.R., 28 Mad., 355.

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defendants Nos. 2 to 5 in the zamindari during the life-time of th first defendant, and as they had no notice that it was intended t apply for a sale of their interests we think the two orders i question do not render the orders for sale *res judicata* agains them. As regards the other objection taken in the lower Court w agree with the judgment of the Subordinate Judge.

Lastly it was further contended before us on behalf of th respondents that even if the decree for sale did not operate agains the zamindari in the hands of defendants Nos. 2 to 5, the orde under appeal for the appointment of a Receiver until further orde should be upheld as against the second defendant personally although the decree-holder in his petition did not ask for executio against the defendants personally, but only for sale and the appoint-ment of a Receiver pending sale. As the question was not muc argued in the first instance we directed it to be further argued afte we had stated our conclusions on the other parts of the case. Fo the appellant it is contended that we have no jurisdiction to tak this course because as against these defendants the property ca no longer be considered to be the subject of the suit, and the propert is not under attachment, so that neither of the grounds specified i section 503 of the Civil Procedure Code is present. We thin however that where a Receiver has been validly appointed on th ground that the property was the subject-matter of the suit an it afterwards turns out on appeal that the decree only operate against the defendants personally the Appellate Court has juris-diction to maintain the Receiver as a method of realizing th decree amount from the judgment-debtor personally. The lowe Court had jurisdiction to appoint the Receiver; he is now i possession, and the property is therefore actually under attachmen although it has not been attached in the manner prescribed i section 274 in the case of immoveable property. The process o attachment is intended for the protection of the decree-holde (*Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee*(1)) and even where there has been no attachment as required by the Code a sale in execution has none the less been upheld (*Kishory Mohun Roy* v. *Mahomed Mujaffar Hossein*(2), *Muniappa Naik* v. *Subramani Ayyan* (3)).

(1) 8 W.R., 10. (2) I.L.R., 18 Calc., 188. (3) I.L.R., 18 Mad., 437.

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Even supposing we have jurisdiction it s next contended that we should not exercise it because it is said the decree-holder has entered into possession of the zamindari under usufructuary mortgages executed subsequently to the date of the decree and has out of the rents and profits not only satisfied those mortgages but also the present decree. The respondent denies that he has been in possession or realized any balance in satisfaction of the decree. The evidence on record does not enable us to decide between these contentions, but we think it unnecessary to do so. This contention was raised in the Court below and in our opinion was rightly rejected. According to the decisions of this Court in *Appa Rao* v. *Krishna Ayyangar*(1) and *Vaidhinadasamy Ayyar* v. *Somasundram Pillai*(2) amounts realized by a usufructuary mortgagee remaining in possession after a decree for sale cannot be applied in satisfaction of the decree amount unless certified under section 258 of the Civil Procedure Code. The present case is much stronger as the sums in question are alleged to have been realized under mortgages which are not the subject of the present suit or decree. Accounts between the parties in respect of such mortgages certainly cannot be taken in execution of the present decree, but must form the subject of a separate suit.

The second defendant has undoubtedly had the advantage of the advances under the suit mortgage which were made for the purpose of protecting his right to the succession, and there appears to be no question as to his personal liability on the decree. The order under appeal is one which might have been made against him personally if the decree-holder had asked for it, and as it is, the fact that in the Court below he waived the prayer for sale comes very near to an application to execute the decree personally. Under the special circumstances of the present case and as it has not been shown to us that the appellant can be in any way prejudiced we think the order of the lower Court should be supported as against the second defendant.

We accordingly allow the execution petition to be amended by inserting a prayer for execution against the second defendant personally and uphold the order under appeal so far as he is concerned.

Under the circumstances we make no order as to costs.

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(1) I.L.R., 25 Mad., 537 at p. 539. (2) I.L.R., 28 Mad., 473 at p. 478.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Miller.

1906. December 11.

RAJA KAMODANA VENKATANARASIMHA RAMACHANDRA ROW BAHADUR, ZAMINDAR GARU AND OTHERS (DEFENDANTS—RESPONDENTS), APPELLANTS,

v.

RAJA LAKSHMINARASAMMA ROW ZAMINDARNI GARU (PLAINTIFF—APPELLANT), RESPONDENT.*

Pensions Act XXIII of 1871, *s.* 4—*Suit, for maintenance under an agreement by which claim to pension and other properties is relinquished not a suit relating to pension and is cognisable by Civil Courts.*

Where a widow entitled to a portion of a pension and other properties, relinquishes such rights in consideration of a maintenance allowance, which is not made payable out of the pension and is not dependant on it, a suit by her to recover such allowance is not a suit 'relating to pension' within the meaning of section 4 of the Pensions Act and is cognisable by Civil Courts.

There is nothing in the Pensions Act which prohibits such relinquishment by the widow or the agreement to pay her maintenance.

THE facts are fully set out in the judgment of the lower Appellate Court which was as follows:—

"Plaintiff (appellant) is the widow of first defendant's brother. She sues to recover maintenance at the rate of Rs. 100 a month with interest.

The District Munsif has dismissed the suit on the ground that, under section 4 of the Indian Pensions Act, it cannot be entertained without a certificate from the Collector.

Plaintiff bases her suit on an agreement (exhibit A) executed in her favour by the first defendant in which he undertakes to pay her Rs. 100 a month as maintenance with Rs. 1,000 as arrears of maintenance for ten months. In exhibit A the first defendant, after reciting that he has been directed by the Collector to pay the appellant Rs. 100 a month out of the family pension of Rs. 600 a month, agrees to do so. The point for determination is whether, having regard to the provisions of the Indian Pensions Act, a Civil

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* Civil Miscellaneous Appeal No. 49 of 1906, presented against the order of remand of M. D. Bell, Esq., District Judge of Kistna at Masulipatam, in Appeal Suit No. 450 of 1905, presented against decree of M.R.Ry. R. Gopala Row, District Munsif of Gudivada, in Original Suit No. 331 of 1904.

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Court has jurisdiction to try the suit without a certificate from the Collector.

If the plaintiff were suing as a sub-maintenance-holder, to have Rs. 100 a month allotted to her out of the pension of Rs. 600 a month allowed by Government to family, the suit would no doubt be barred by section 4 of the Pensions Act. But this is not the case. The plaintiff does not ask that the money should be paid out of the Pension Funds, nor does the agreement on which she bases her suit specify that it should be paid out of these funds. The family possesses considerable property irrespective of the pension and in Exhibit B the plaintiff agreed to surrender all claims to the rest of the family property in consideration of her being paid Rs. 100 a month. No doubt the agreement was entered into as the result of the Collector's order but that does not seem to me to be material. The plaintiff seeks to make the whole family property liable for her maintenance not merely the Rs. 100 a month pension.

The appeal is allowed. The suit will be restored to the file and disposed of according to law."

Defendants appealed.

P. R. Sundara Ayyar and *K. Subramania Sastriar* for appellants.

V. Krishnaswami Ayyar and *P. Nagabhushanam* for respondents.

JUDGMENT.—We do not think that this suit can properly be said to be one "relating to any pension" granted by Government within meaning of section 4 of the Pensions Act 23 of 1871. It is a suit for the recovery of maintenance payable to the plaintiff, a Hindu widow, by virtue of a Karar or agreement made between her and the first defendant as the person responsible to maintain her. No doubt in the Karar there are recitals *inter alia* as to the amount of pension which was being paid to the family and certain orders of the Collector in regard thereto, but there is no agreement that the maintenance allowance is to be paid out of the pension allowance or is to depend on it.

The plaintiff gave up various claims which she had in regard to the family property and also her claim to a portion of the pension, and in lieu of all her claims the first defendant agreed to pay her Rs. 100 per mensem until her death.

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RAJA VENKATA-NARASIMHA RAMA-CHANDRA ROW v. RAJA LAKSHMI-NARASAMMA ROW.

There is nothing in the Pensions Act to prohibit such a relinquishment by the plaintiff, nor such an agreement as the present by the first defendant.

The facts in the cases reported in *Babaji Hari* v. *Rajaram Ballal*(1), *Syed Mahommed Isaack Mushyack* v. *Azeezoon Nissa Begam*(2) and *Andi Achen* v. *Kombi Achen*(3) and relied on by the appellant are different from those in the present case and are not, in our opinion, opposed to the view we have taken.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1906. December 7.

SUBRAMANYA CHETTIAR (NINTH DEFENDANT—COUNTER-PETITIONER), APPELLANT,

v.

ALAGAPPA CHETTIAR BY AGENT PALANIAPPA CHETTI (PLAINTIFF—DECREE-HOLDER PETITIONER), RESPONDENT.*

Limitation Act XV of 1877, sched. II, art. 179—Application for execution against some defendants jointly liable under decree takes effect against all persons jointly liable.

Where a decree awards mesne profits against A and B jointly and costs jointly against A, B and C, an application to execute the decree for mesne profits against A and B keeps alive the right to execute the decree for cost against C under part 2 of paragraph 2, explanation 1 to article 179 of schedule II to the Limitation Act. *Krishnamachariar.* v. *Mangammal.*, (I.L.R., 26 Mad., 91), referred to.

THE decree in Original Suit No. 233 of 1899, in execution of which this appeal arose, was a joint decree for mesne profits against defendants Nos. 1 and 2 and a joint decree for costs against defendants Nos. 1, 2, 6, and 9.

The last application for execution of that portion of the decree relating to costs was in August 1901; the present application was

(1) I.L.R., 1 Bom., 75. (2) I.L.R., 4 Mad., 341.
(3) I.L.R., 18 Mad., 187.

* Civil Miscellaneous Second Appeal No. 5 of 1906, presented against the decree of H. Moberly, Esq., District Judge of Tanjore, in Appeal Suit No. 775 of 1905, presented against the order of M.R.Ry. J. Sundaranana Rao, District Munsif of Tiruthuraippundi, in Execution Petition No. 81 of 1905 in Original Suit No. 233 of 1899.

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SUBRAMANYA CHETTIAR v. ALAGAPPA CHETTIAR BY AGENT PALANIAPPA CHETTY.

[i]n March 1905. But in April 1903, February 1904 and February [1]905 the decree-holder had applied to execute the decree against [d]efendants Nos. 1 and 2 with regard to mesne profits.

The District Munsif refused to recognize these applications as preventing time from running against the ninth defendant, and dismissed the application against him as barred.

The decree-holder appealed. The order of the Munsif was reversed and execution was ordered to issue against the ninth defendant.

The ninth defendant appealed to the High Court.

S. Krishnamachari for appellant.

C. V. Anantakrishna Ayyar for respondent.

JUDGMENT.—This case is not free from difficulty, but the conclusion we have come to is that the District Judge was right.

For the purpose of the question raised in the appeal it is only necessary to state that the decree was a joint decree for costs against defendants Nos. 1, 2 and 9 and a decree for mesne profits against defendants Nos. 1 and 2.

An application for execution against defendants Nos. 1 and 2 as regards mesne profits was put in within three years prior to the present application. The question is does this application have the effect of keeping alive the plaintiff's right to execute his decree for costs against the ninth defendant, a right which would otherwise be barred by limitation? The answer to this question depends upon whether the present case falls within the first on the second part of paragraph 2 of explanation 1 in connection with article 179 of the second schedule to the Limitation Act. Reading the second part of the paragraph literally there can be no doubt that it applies. There has been a joint decree against more persons than one, and there has been an application in execution of that decree against two of these persons and this application takes effect against all the persons against whom the joint decree was passed.

We think the explanation should be read literally as in the analogous case (*Kistnama Chariar* v. *Mangammal*(1)) and so reading it we must hold that the plaintiff's right to execute his decree for costs against the ninth defendant was not barred by limitation.

We dismiss this appeal with costs.

(1) I.L.R., 26 Mad., 91.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Benson and Mr. Justice Miller.

1906. December 3, 4, 21.

MUTHUVEERA VANDAYAN (APPELLANT-PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (RESPONDENT-DEFENDANT), RESPONDENT.*

Darkhast rule 14—Jurisdiction of Civil Courts—Registry under rule 14 only conditional—Civil Courts can interfere only when public servant acts outside his authority.

Under rule 14 of the Darkhast rules, the registry by the Tahsildar and the original grant are subject to the result of any appeal that might be admitted by the Deputy Collector. Civil Courts have no jurisdiction to question the validity of acts done by Government officers when they act within the scope of their authority.

The propriety of a decision by a darkhast authority, original or appellate, acting within the scope of its powers cannot be a subject of investigation by the Civil Courts.

THE facts of the case are fully set out in the judgment of the Division Bench in *Muthu Veera Vandayan* v. *The Secretary of State for India*(1).

The plaintiff appealed under clause 15 of the Letters Patent.

K. Ramachandra Ayyar for appellant.

The Government Pleader for respondent.

JUDGMENT (Sir ARNOLD WHITE, C.J.).—I adhere to my former judgment.

BENSON, J.—I adhere to the judgment which I delivered when the second appeal came before the learned Chief Justice and me. I have nothing to add to it.

I would dismiss this appeal with costs.

MILLER, J.—The Tahsildar made a grant of the land in question to the appellant on the 10th of May 1897, and after waiting for the period prescribed by the rules, registered his name as that

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* Appeal No. 36 of 1906, presented under section 15 of the Letters Patent against the decree of Mr. Justice Benson in Second Appeal No. 984 of 1904, presented against the decree of the Subordinate Judge's Court of Tanjore in Appeal Suit No. 328 of 1903 (Original Suit No. 216 of 1902).

(1) I.L.R., 29 Mad., 461.

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MUTHUVEERA VANDAYAN v. THE SECRETARY OF STATE FOR INDIA.

of the person entitled to receive a patta at the next jamabandi. Subsequently appeals were presented to the Deputy Collector against the Tahsildar's order making the grant, and were admitted by the Deputy Collector though presented after the expiry of the prescribed period: and while they were pending a patta was issued to the appellant for the land. The Deputy Collector disposed of the appeals on the 26th June 1899, setting aside the Tahsildar's order on the ground that there were irregularities in the publication of the prescribed notice, and declining to grant the land to any one on the ground that it was commanded by the Vadavar irrigation project.

The present appeal is against this order and the appellant asks us to declare that he has obtained a right to occupy the land under the grant made by the Tahsildar.

The first point pressed upon us was this: after registry the grant cannot under the rules be revoked.

This contention is in my view untenable. My view of the matter is that by rule 14 registry is 'conditional,' just as the grant is conditional: it is subject to the result of the appeal, if any. In rule 14 it is laid down that registry is to be withheld after receipt of notice of appeal, or 'if ordered' is to be considered conditional only till the appeal is disposed of. It is not quite clear whether the words 'if ordered' are to be read as 'if already ordered' or as 'if ordered subsequently,' but the next following sentence in the rule rather indicates that the notice referred to in this part of the rule is a notice sent before the expiry of the appeal time, and if so that part of the rule may not be applicable to the present case. It is then necessary to examine the concluding portion of the same rule which runs as follows: "it should be distinctly understood that registry ordered by subordinate officers will be considered only conditional and that it will be liable to cancellation by a superior authority if the grant is found to be irregular and unauthorised though there may be no proof of fraud." This clearly refers to registry made after the appeal time has expired, if not to all cases in which registry is made by a subordinate officer, and it may be read as containing one proposition or as containing two propositions; in the former case all that follows the word 'conditional' is to be taken as an expansion or explanation of that word, and in the latter case as a separate proposition declaratory of part of the law relating to public agents.

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MUTHUVEERA VANDAYAN v. THE SECRETARY OF STATE FOR INDIA.

The clause is explained in the case of *The Secretary of State for India* v. *Kasturi Reddi*(1) by Sir Bhashyam Ayyangar, and he there deals with it as containing one proposition only. But it was not necessary for the purposes of the case before him to consider whether it may not with equal or greater propriety be read the other way, as laying down two propositions (1) declaring that the registry is conditional and (2) setting out part of the law relating to public agents.

And I do not think that, in so reading it, I am adopting a view necessarily contrary to that entertained by him. It seems to me that mine is the view which best brings into harmony rules 13 and 14. Taking the other view it is necessary to hold that an appeal admitted out of time can be allowed only on the ground that the grant was irregular, or unauthorized, or fraudulent, and there is, it seems to me, no reason why the appellate authority should be subjected to these limitations, especially as no appeal is required to enable the principal to annul a grant by his agent which is made in excess of the authority of the agent.

Further to declare that a grant is conditional *and* that it may be cancelled for certain reasons, is, perhaps, a not entirely accurate way of laying down the rule that such a grant is conditional in that it may be cancelled for those reasons. This, it may be said, is hypercriticism, but that objection cannot be taken to the further consideration that the rules fix the date of the issue of the patta and not that of the registry as the point of time after which no appeal can be preferred. This of itself almost implies that the registry is conditional on the result of the appeal, if any, and that is made more clear by the clause in rule 14 which I have quoted. There is, as I have said above, no apparent reason why one class of appeals should be allowed before registry and a more restricted class between registry and issue of patta.

For these reasons I think the word conditional in the last part of the rule should be read as 'conditional' on the result of the appeal, as in the earlier part of the same rule and the appellant's first contention must fail; the registry of his name was like the original grant subject to the result of any appeal that might be admitted by the Deputy Collector before patta was issued.

(1) I.L.R., 26 Mad., 268 at p. 282.

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The other question must, I think, be decided on the pirnciple ennunciated by Sir Bhashyam Ayyangar in *Secretary of State for India* v. *Kasturi Reddi*(1) and in *Sappani Asari* v. *The Collector of Coimbatore*(2). The Civil Courts can enquire whether the officers of the Government are acting within the scope of their authority, and nothing more.

I entirely agree with what is pointed out in the latter case, that any other rule will lead to confusion, and the whole body of Darkhast rules will become unworkable in the Civil Courts.

The Deputy Collector was undoubtedly acting within the scope of his authority in hearing and determining the appeals; and in my opinion the Civil Courts have no power to investigate the question whether his decision of the appeal was one which he could or could not have arrived at by strictly following the rules laid down for the guidance of officers in disposing of applications for waste lands.

No doubt the Tahsildar had authority to make the grant to the appellant, and once that was made there was a conditional contract between him and the crown, but the condition was that the grant should be subject to the result of any appeal that might be preferred to the Divisional Officer. The rules do not confine the Divisional Officer to the consideration of any particular classes of grounds of appeal, but assuming that he is restricted to matters which are dealt with in the rules his decision in this case proceeds on grounds so dealt with. The question whether the grant was made after following the procedure laid down by the rules, and the question whether it was 'objectionable' under rule 2 are obviously matters properly coming within the cognizance of the appellate authority.

It is not alleged in the plaint that the 'Vadavar project' came into existence after the grant was made by the Tahsildar.

It being clear on the authorities that the Civil Courts could not interfere with the Tahsildar's grant on the ground that it was irregularly made. Can we apply a different rule to the Deputy Collector's decision? I am unable to see any principle on which that can be done: the condition of the grant is that it is subject to the result of the appeal, and provided that the grant is not

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(1) I.L.R., 26 Mad., 268. (2) I.L.R., 26 Mad., 742.

MUTHUVEERA VANDAYAN v. THE SECRETARY OF STATE FOR INDIA.

revoked otherwise than as the result of an appeal it is not revoked without authority.

The question whether the Deputy Collector did or did not adhere to the prescribed rules in the exercise of his authority is precisely the same question as may arise in regard to the decision of the Tahsildar, and can no more be investigated by a Civil Court in the one case than it can in the other.

For these reasons I am of opinion that the appeal ought to be dismissed with costs.

The result is the appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

1906. December 12, 13, 20.

GOPALA ROW GADAI ROW SAHEB AND OTHERS (RESPONDENTS NOS. 1 TO 10 IN CIVIL REVISION PETITION No. 12 OF 1906), APPELLANTS,

v.

MARIA SUSAYA PILLAI AND OTHERS (PETITIONERS IN CIVIL REVISION PETITION No. 12 OF 1906), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, *ss.* 102, 103 *and* 157—*Dismissal of suits—When plaintiff's pleader declines to proceed is dismissal for default within s.* 102 —*Discretion in restoring such suit to file not to be interfered with on revision except on strong grounds.*

On the day in which a suit was posted for hearing, the plaintiff's pleader appeared and applied for an adjournment which was refused. The pleader declined to proceed with the suit, and the plaintiff, who was present in Court, took no steps. Thereupon the suit was dismissed in these words :

'The plaintiff's pleader said that he was not willing to proceed. So the suit was dismissed.'

The plaintiff subsequently applied for restoration under sections 103 and 157 and the suit was restored to the file :

Held, that the dismissal of the suit under the above circumstances, was a dismissal for default under section 102, and that the order restoring the suit was rightly passed.

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* Appeal No. 53 of 1906, presented under clause 15 of Letters Patent against the order of Mr. Justice Moore in Civil Revision Petition No. 12 of 1906, presented against the order of the Court of the District Munsif of Tiruvadi in Civil Miscellaneous Petition No. 1562 of 1905 in Original Suit No. 145 of 1905.

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GOPALA ROW v. MARIA SUSAYA PILLAI.

A plaintiff 'fails to appear' within the meaning of section 102, when his pleader declines to proceed with the suit and it makes no difference that the party himself was present in Court:

Held also that, under the circumstances, the order of restoration should not have been interfered with on revision.

ORIGINAL SUIT No. 145 of 1905 on the file of the Munsif's Court of Tiruvadi was posted for hearing on 10th October 1905. The plaintiff's pleader applied for an adjournment which was refused. On his declining to proceed with the case, the suit was dismissed. The plaintiff subsequently applied to have the suit restored to the file under sections 103 and 105 of the Code of Civil Procedure. His application was granted.

The defendants moved the High Court under section 622 to set aside the order of restoration, and the order was set aside by Mr. Justice Moore. The judgment of the learned Judge is as follows :—

JUDGMENT.—Sections 103 and 157 of the Civil Procedure Code do not apply. The vakil for the plaintiffs was present and such being the case it cannot be held that the plaintiffs were not present. The order of the District Munsif restoring the suit to his file was not in accordance with law. This Civil Revision Petition is allowed with costs and the order of the District Munsif passed on the 7th November 1905 is set aside.

Against this judgment the plaintiff appealed under clause 15 of the Letters Patent.

S. Subrahmania Ayyar for appellants.

P. R. Sundara Ayyar and *S. Gopalaswami Ayyangar* for respondents.

JUDGMENT (Sir ARNOLD WHITE, C.J.).—In this case I find myself unable to agree with the view of the learned Judge that the order of the Munsif restoring the case to his file was not in accordance with law. The circumstances in which the Munsif made the order restoring the suit to his file are stated in the order of restoration as follows :—

"On 10th October 1905, this suit came on for hearing. Then plaintiffs' pleader asked for an adjournment and it was dismissed. Then plaintiffs' pleader said that he was not willing to proceed with the suit. So the suit was dismissed."

The application for restoration purports to have been made under sections 157 and 103 of the Civil Procedure Code and the

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order of the District Munsif purports to have been made under the powers conferred by these sections. In support of the order of the learned Judge of this Court, Mr. Sundara Ayyar contended that the form of the "judgment" dismissing the suit showed that the dismissal was not a dismissal for default of appearence, but on the merits, and this being so, there was no jurisdiction to make an order of restoration. The judgment, after setting out the pleadings and the issues, states the circumstances in which the application for adjournment was made and the refusal of the application. It states that the plaintiffs' pleader was not willing to proceed with the suit and the suit was therefore dismissed. I do not think there is anything in the form of the judgment which precludes us from holding that the suit was dismissed for default and there can be no doubt that, whatever may have been the Munsif's view when he dismissed the suit, when he dealt with the application to restore, the fact of his making the order shows that he considered the suit had been dismissed for default. No authority has been cited which precludes us from holding that, in the circumstances in which the suit was dismissed, section 102 of the Code applies. It seems to me the plaintiff failed to appear as from the time when his pleader declined to proceed with the case. On behalf of the appellant it was suggested that the plaintiff was present in Court when his pleader declined to proceed. Even if it were so, this, in my view, makes no difference. The plaintiff was not appearing in person but by his pleader, and if it can be said that the pleader failed to appear, as from the time when he declined to proceed, it follows that the party also failed to appear.

It seems to me a very strong thing for an appellate or revisional authority to interfere in a case when the Court, before which a suit has been instituted and has been dismissed without being tried, is of opinion that the case ought to be tried; and I think a generous construction should be placed on the enactment which gives the power to restore. The general policy of the Legislature in a matter of this sort is shown by the fact that a right of appeal is given against an order refusing to restore, but no right of appeal is given against an order of restoration.

As to the question of "sufficient cause" I do not think, on the facts of this case, that a Court of revision ought to have interfered with the discretion exercised by the Munsif. It was suggested that the Munsif exercised no discretion since the form

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of his order shows that he was of opinion that the plaintiff was entitled to the order of restoration as of right. I do not so read the order speaking for myself I see no reason to differ from the judgment of Sir Bhashyam Ayyangar in *Somayya* v. *Subbamma*(1).

GOPALA ROW v. MARIA SUBAYA PILLAI.

But I prefer to base my judgment in the present case on the broad ground that, on the facts, the order of restoration should not be interfered with in revision.

I think the appeal should be allowed and the revision petition dismissed and that costs should abide the event.

BENSON, J.—On the facts, I think, that the order of the District Munsif restoring the suit to his file must be taken to have been made, as he says it was, under sections 103 and 157 of the Civil Procedure Code, and that the case is not one in which his discretionary power to set aside the order of dismissal should have been interfered with in revision. On this ground I concur in the proposed order of the learned Chief Justice.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

THE RAJAH OF VENKATAGIRI (PETITIONER—PLAINTIFF), APPELLANT IN BOTH,

1907. January 4, 17.

v.

VUDUTHA SUBBARAYUDU (RESPONDENT—DEFENDANT), RESPONDENT IN BOTH.*

Contract Act IX of 1872, s. 70—Inamdar taking water for which Zemindar is compelled to pay water-cess must recoup Zemindar.

When the holder of an inam within a zemindari takes for his benefit Government water and the Zemindar, whose moveable and immoveable properties are liable for the payment of the cess to Government, pays them, the latter can recover the amount of cess so paid from the inamdar under section 70 of the Contract Act. The Zemindar must be considered as rendering himself liable for the benefit of the inamdar and as not intending to do so gratuitously.

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(1) I.L.R., 26 Mad., 599.

* Appeals Nos. 54 and 55 of 1906, under article 15 of the Letters Patent against the orders of Mr. Justice Moore in Civil Revision Petitions Nos. 274 and 280 of 1905, presented to revise the decrees of the District Munsif of Nellore in Small Cause, Suits Nos. 2951 and 2947 of 1904.

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THE RAJAH OF VENKATAGIRI v. VUDUTHA SUBBARAYUDU.

The facts necessary for this case are set out in the judgm

S. Subrahmania Ayyar for appellant.

The respondent was not represented.

JUDGMENT.—These are appeals under section 15 of the Lette Patent from orders of the learned Judge dismissing revisio petitions under section 25 of the Small Cause Courts Act IX 1887 against the judgment of the District Munsif dismissin suits filed by the Rajah of Venkatagiri to recover from the holde of service inam lands water-rate paid by him in respect of su lands. The respondents were not represented before us or befo the learned Judge.

The District Munsif held that the defendants were entitled hold the service inam land without paying any tax or teerva long as they rendered service, and that, in the absence of expre contract, water-rate collected from the Zemindar in respect of su land could not be recovered by him from the inamdar. It does no however, follow that because the inamdar holds the land rent fre he is entitled to take water from a Government source for the u of his land and leave the Zemindar to bear the water-rate which, consequence of his action, becomes payable to Government und Madras Act VII of 1865. Under section 1 such water-rate is be levied on the land and, under section 2, arrears are to be realis in the same manner as arrears of land revenue, that is to say, fro the landholder under Madras Act II of 1864, they may therefo be levied by sale of the moveable property of the landholder w is the Zemindar or by sale of the land. The Zemindar hims derives no benefit from the water, and must, we think, be treated taking it and rendering himself liable to pay for it for the use the inamdar, and as not intending to act gratuitously. Und these circumstances the inamdar, who has enjoyed the benefit the water, is bound under section 70 of the Indian Contract Act I of 1872 to compensate the Zemindar by refunding the water-ra which the Zemindar has been obliged to pay.

We must, therefore, allow the appeals, reverse the orders of t learned Judge and the decrees of the District Munsif and g judgment for the plaintiff with costs throughout.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. January 25, 29.

VAIDYANATHA SASTRIAL (DEFENDANT—PETITIONER), APPELLANT,

v.

EGGIA VENKATARAMA DIKSHITAR (PLAINTIFF—RESPONDENT), RESPONDENT.*

Civil Procedure Code, Act XIV of 1882, *section* 266—*A hereditary allowance out of melwaram of lands attachable.*

A hereditary grant of an allowance of paddy out of the melwaram of certain land is not a right to future maintenance such as is exempted from attachment under section 266 of the Code of Civil Procedure.

THE facts were thus stated in the judgment of the Munsif.

"Application to release certain properties from attachment.

The plaintiff, decree-holder, attached defendant's right to receive a certain annual allowance from the melwaram of certain estates which are now under the management of the Tanjore District Court.

Defendant contends that the allowance in question was a provision for the maintenance of himself, his forefathers and descendants; that it is not an attachable or saleable right. He also argued, though the question was not raised in the affidavit, that the allowance, if attachable, was moveable property and its attachment as immoveable is illegal."

The Munisif held that the grant was attachable. His decision was confirmed on appeal by Subordinate Judge.

The defendant appealed against the order of the Appellate Court.

M. Narayanaswami Ayyar for appellant.

R. Kuppuswami Ayyar for respondent.

JUDGMENT.—It is the case of the appellant in his affidavit that he has a hereditary right to this allowance out of the melwaram

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* Civil Miscellaneous Second Appeal No. 45 of 1906, presented against the order of M.R.Ry. M. Visvanatha Ayyar, Subordinate Judge of Negapatam, in Appeal Suit No. 105 of 1906, presented against the order of M.R.Ry. K. S. Lakshminarasa Ayyar, District Munsif of Valangiman, in Execution Application No. 1426 of 1905 in Execution Petition No. 698 of 1905 (Small Cause Suit No. 1927 of 1900) on the file of Sub-Court of Kumbakonam.

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VAIDYANATHA SASTRIAL v. EGGIA VENKATA-RAMA DIKSHITAR.

of certain lands. If this is so it is attachable (*Muthuraman Chettiar* v. *Sunderakumara Ettappasami*(1)). We do not think the appellant can now be heard to argue the case on the basis that he has no legal right to the allowance, and that it is only a voluntary grant by the Tanjore Palace.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice and Mr. Justice Miller.

1906. December 6.

SRI MIRAZA PUSAPATI VIZIARAMA GAJAPATI RAJ MAHARAJ MANNYA SULTAN BAHADUR, MAHARAJA OF VIZIANAGARAM (PLAINTIFF), PETITIONER,

v.

SAHIB MEHARBAN-I-DOSTAN SRI SATRUCHERLA SOMASEKARA RAJU BAHADUR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Ganjám and Vizagapatam Agency rules, Act XXIV of 1839, rule 20—High Court may interfere when Agent decides wrongly on question of limitation—Limitation Act XV of 1877, schedule II, article 14 does not apply when Act complained of is a nullity.

An erroneous decision by an Agent acting under the Ganjám and Vizagapatam Agency rules, on a question of limitation is a 'special ground' which will authorise an interference by the High Court under Rule 20 of such rules.

Article 14, schedule II of the Limitation Act does not apply to an act done by a Government officer, when such act purports to be done in pursuance of an order, but, is in fact, owing to a mistake, not so done. Such an act is a nullity which need not be set aside.

SUIT by plaintiff before the special Assistant Agent of Parvatipur for the recovery of a village with mesne profits. The plaintiff's case was that in executing an order of His Majesty in Council, the Collector in 1894 by mistake put plaintiff in possession of a

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(1) 9 M.L.J., 118.

* Civil Miscellaneous Petition No. 1061 of 1906, presented under rule 20 of the Ganjam and Vizagapatam Agency Rules, praying the High Court to direct R. H. Campbell, Esq., Agent to the Governor at Vizagapatam, to review the decree in Appeal Suit No. 1 of 1906 on his file, presented against the decree of P. C. Dutt, Esq., Special Assistant Agent, Parvatipur division, in Original Suit No. 13 of 1905.

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ge called Boddidi whereas according to the order he ought ave been put in possession of the plaint village. The suit was ght in 1905. The Assistant Agent held that the suit was to set aside an act of the Collector and being brought more n one year after the act was done, it was barred under Article schedule II of the Limitation Act. The Agent confirmed the ree on appeal.

Plaintiff moved the High Court under Rule 20 of the Agency es.

T. Rangachariar and *S. Srinivasa Ayyangar* for petitioner.

C. R. Tiruvenkatachariar, *V. Ramesamy* and *K. Subrahmania stri* for respondent.

JUDGMENT.—On behalf of the respondents to this appeal, the jection has been taken that having regard to the terms of Rule no order ought to be made by this Court even in the view that judgment of the Agent on the question of limitation was ong. It was urged that there were no "special grounds" in this e, since, in any view, the plaintiff was not entitled to sue for ssession of the village which he claims, and that his only remedy s to apply in execution under section 244 of the Code of Civil ocedure. Section 244 does not apply to agency tracts, and it is no way clear that the plaintiff's proper remedy was by applican in execution under section 244. However, we express no inion on this point. In the view that the Agent was wrong as the limitation question, there are, in our opinion, special grounds thin the meaning of this rule which would warrant the interrence of this Court, and unless we are satisfied that our interence in any event would be futile and we are not so satisfied, do not think we ought to decline to interfere.

For the purpose of the question of limitation, it was conceded argument before us, that the act done by the officer of Governnt purported to have been done in pursuance of the order of Collector made under section 265, and that, by reason of a stake having been made as to the village mentioned in the der, the plaintiff was put into possession of a wrong village. this state of things, it seems to us, that the act which purported be in pursuance of the order, and in fact was not so, should be eated as a nullity, and that it is not a condition precedent to plaintiff's right to sue for possession of the village, to which is entitled under the order that he should get the act, which

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was done under a mistake of fact, set aside. This being so, article 14 of the II schedule to the Limitation Act has no application. The principle in the case of *Alimuddin* v. *Ishan Chandra Dey*(1) where an officer of Government who purported to act under a statutory authority, in fact acted in excess of that authority, and it was held his act should be treated as a nullity, is applicable to the facts of the case before us.

Accordingly, under Rule 20 of the Ganjám and Vizagapatam Agency Rules, we must direct the Agent to review his judgment by the light of these observations. Our order, is of course, without prejudice to the respondent taking the point that the plaintiff is not entitled to bring a separate suit.

Costs of this application will abide the event.

APPELLATE CRIMINAL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

1906. December 4.

KRISHNASWAMI THATHACHARI AND OTHERS

v.

VANAMAMALAI BHASHIAKAR.*

Criminal Procedure Code, Act V of 1898, *ss.* 110 (*e*), 112, 107—*Enquiry under s.* 107 *illegal without issuing notice under s.* 112.

A Magistrate before taking action under section 107 of the Code of Criminal Procedure is bound to issue the notice required by section 112 and his omission to do so is an illegality which will render the subsequent proceedings invalid.

A notice issued with reference to section 110 (*e*) is not sufficient as a preliminary to the Magistrate making an order under section 107.

THE proceedings in this case commenced with two petitions presented to the Joint Magistrate of Chingleput. He issued a notice under section 110 (*e*) of the Code of Criminal Procedure, but the Treasury Deputy Collector who tried the case considered the section not applicable and informed the petitioners that proceedings

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(1) I.L.R., 33 Calc., 693.

* Criminal Revision Case No. 339 of 1906, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of G. W. Dance, Esq., District Magistrate of Chingleput, in Dis. No. 320 M., passing orders upon a petition presented against the judgment of the Treasury Deputy Magistrate of Chingleput in Miscellaneous Case No. 1 of 1906.

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would be held under the first part of section 107. He accordingly proceeded with the enquiry, and under section 118 of the Criminal Procedure Code directed bonds to be executed for keeping the peace for a year. A petition to revise this order was dismissed by the District Magistrate.

Petitioners moved the High Court.

V. Krishnaswami Ayyar and *T. R. Krishnaswami Ayyar* for *T. R. Ramachandra Ayyar* for petitioners.

The Public Prosecutor (Mr. *E. B. Powell*) and Mr. *M. A. Tirunarayanachariar* opposed the application.

ORDER.—The Magistrate having arrived at the conclusion that section 110 of the Code of Criminal Procedure with reference to which notice under section 112 had been issued was inapplicable to the case, ought not to have proceeded to deal with the case as one under section 107 of the Code of Criminal Procedure without first issuing a notice under section 112 with reference to the altered view of the circumstances which the Magistrate considered sufficient to warrant him in taking proceedings against the accused.

No such order was passed. The omission was a non-compliance with an express provision of the law, and therefore renders the subsequent proceedings invalid.

We are unable to agree with the argument of the Public Prosecutor that notice issued with reference to section 110 (*e*) should be held to be sufficient as a preliminary to the Magistrate making an order under section 107. The facts necessary to be proved in order to make the accused liable under section 110 (*e*) are different from those necessary to be proved in order to make him liable under section 107, and the party proceeded against should have due notice of the facts on which the Magistrate proposed to proceed against him.

We, therefore, set aside the order of the Magistrate without going into other questions raised before us in regard to its legality.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1906. October 12, 15, 16, 30.

SADA KAVAUR (DEFENDANT), APPELLANT.

v.

TADEPALLY BASAVIAH (PLAINTIFF), RESPONDENT.*

Covenant, construction of—Transfer of Property Act, Act IV of 1882, ss. 55 and 59—What amounts to a 'contract to the contrary' within the meaning of section—Contract Act, Act IX of 1872, s. 20—Mistake does not prevent the party from claiming the protection of a special covenant—Want of attestation as laid down in s. 59 of the Transfer of Property Act, will not bar the personal remedy.

A, who had brought a suit to recover the amount due on a mortgage executed to him, assigned to *B* for valuable consideration, all his claims under the mortgage deed and in the suit brought by *A*. The assignment contained a covenant that '*A*, his executors or administrators shall not be liable for any defect in the claim hereby transferred and assigned or for any sums of money that may not be recovered.' Subsequent to the assignment, *B*, was added as a co-plaintiff in the suit brought by *A* and it was discovered that the mortgage executed to *A*, was inoperative as it was attested by only one witness and the suit was withdrawn.

B filed a suit against *A* for a declaration that the contract of assignment was void and for a return of the consideration paid:

Held, that *A* was entitled to claim the benefit of the covenant, which exempted him from any liability, even though both *A* and *B* acted under the mistaken belief that the mortgage was valid and that *A* was not bound to refund the consideration received.

Per Sir ARNOLD WHITE, C.J.—The covenant is a 'contract to the contrary' within the meaning of section 55 of the Transfer of Property Act which will negative the statutory covenant of title under the section.

Per Sir S. SUBRAHMANIA AYYAR, J.—Non-compliance with the rule laid down in section 59 of the Transfer of Property Act as to attestation, does not render the personal covenant void.

Madras Deposit and Benifit Society, Limited v. *Oonnamalai Ammal* (I.L.R., 18 Mad., 29), not approved.

The existence of a separate warranty in a contract is evidence that the matter of the warranty is not a condition or essential part of a contract, a mistake in regard to which will render the contract void under section 20 of the Contract Act.

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* Original Side Appeal No. 57 of 1905, presented against the judgment and decree of Mr. Justice Moore, in Original Suit No. 109 of 1904.

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SADA KAVAUR v. TADEPALLY BASAVIAH.

THE facts necessary for the report are fully stated in the judgment of Sir S. Subrahmania Ayyar, J.

Mr. *W. Barton* for appellant.

V. Krishnaswami Ayyar and *T. Ramachandra Rau* for respondent.

JUDGMENT (Sir ARNOLD WHITE, C.J.).—I am of opinion that this appeal should be allowed. I base my decision on a ground which does not appear to have been considered by the learned Judge who tried the case, viz., that under the special covenant contained in the indenture of 19th February 1902 there is a good defence to the suit. The suit is for a declaration that the contract contained in this indenture is void and for a refund of the purchase money paid. By the indenture, after reciting that the defendant had instituted Suit No. 205 of 1900 on the file of the High Court against a certain Nabob under a deed of mortgage, the defendant assigned to the plaintiff the amount secured by the mortgage and the claim of the defendant in the said suit and also the mortgage and the defendant's right title and interest therein, The indenture contains a covenant that the defendant shall not be liable for any defect in the claim transferred and assigned or responsible for any sum of money that may not be received by the plaintiff under the indenture.

When Original Suit No. 205 of 1900 came on for hearing, it was discovered there was only one attesting witness to the mortgage referred to in the indenture of 19th February 1902. This appears to have been previously overlooked by all parties concerned. The result was that, as the learned Judge who tried the case puts it, nominally on the application of the present defendant, but really on the application of the present plaintiff, the suit was (on 12th January, 1903) withdrawn with permission to the plaintiff in that suit to bring a fresh suit if so advised. No fresh suit, however, was brought, and on 4th August 1904 the plaintiff instituted the present suit against the defendant.

I deal with the case upon the footing that when the indenture of 19th February 1902 was executed both parties acted under the belief that the mortgage referred to in the indenture was, as a mortgage, valid and effective, and that as to this they were both mistaken. This, as it seems to me, does not prevent the defendant from claiming the protection of the special covenant. Assuming that the technical informality in the mortgage deed would

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constitute a breach of the covenant by the vendor which section 55 of the Transfer of Property Act prescribes, I am of opinion that the special covenant upon which the defendant relies negatives the statutory covenant that the interest which the seller professed to transfer subsisted. In other words it seems to me there was a "contract to the contrary" within the meaning of section 55.

The words of the covenant are "any defect" not in the title of the vendor, but "in the claim transferred." The claim is defective not because the mortgagor had no title to convey to the defendant, but by reason of the fact that there was only one attesting witness to the mortgage deed. The question for us is not whether the defendant could obtain a decree for specific performance, but whether the conveyance having been completed, she is protected by the special covenant against a claim for the recission of the contract and the return of the purchase money. In my opinion she is. I think the case of *Motivahoo* v. *Vinayak Veerchand*(1) is distinguishable from the present case for the reasons mentioned in the judgment written by my learned brother which I have had the advantage of reading.

I am of opinion that the defendant has a good defence to this suit on the ground which I have stated. This being so, I do not think it necessary to discuss the other questions raised in the case.

I think the appeal should be allowed with costs here and in the Court of First Instance and the suit dismissed. I think the memorandum of objections should be dismissed.

SUBRAHMANIA AYYAR, J.—The defendant's deceased husband having lent to the late Nabob of Masulipatam Rs. 7,000, obtained for the amount a bond bearing date 1st November 1892, which purported to create a mortgage for the debt on a house and ground of the Nabob in Madras. The Nabob covenanted by the deed to repay the seven thousand with interest thereon at 9 per cent. per annum on the 31st October 1893, but did not do so. He, however, made payments, on account of interest, of Rs. 945 on 22nd May 1894 and Rs. 1,260 on 14th July 1896.

The defendant instituted Original Suit No. 205 of 1900, on 7th December 1900, against the legal representatives of the Nabob, who had by that time died, for the recovery of Rs. 9,695 being the principal and interest due up to the date of the plaint with further

(1) I.L.R., 12 Bom., 1.

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interest. The plaint contained also a prayer for the sale of the property which the bond purported to make security for the debt. Some of the representatives of the Nabob who had been made defendants, filed written statements in which they put the plaintiff to the proof of her claim. The other defendants raised no defence. While this suit was pending, in consideration of a payment by the plaintiff to the defendant of Rs. 5,500 (not Rs. 9,500 as recited in the document), the latter executed an assignment bearing date 19th February 1902 transferring to him her claim as against the Nabob. The subject of the transfer is thus described in the indenture: "All that the said sum of Rs. 9,500 "and all interests hereafter to become due for the same and the "said claim of the vendor in the said Civil Suit No. 205 of "1900, and the mortgage, dated 1st November, one thousand eight "hundred and ninety-two for Rs. seven thousand and all the "estate, right, title, interest, claim and demand of the Sada "Kavaur (the defendant) therein and thereto."

By the indenture the plaintiff covenanted among other things that the defendant "her executors or administrators shall not be "liable for any defect in the claim hereby transferred and assigned "or responsible for any sum or sums of money that may not "be recovered" by him. In pursuance of this assignment, the plaintiff applied to be added as a party in the said Civil Suit No. 205 of 1900. Owing to his not having caused notice of his application to be served upon some of the defendants within the time granted by the Court, the application was dismissed.

Mr. Sriramalu Sastri, the vakil, who had been retained to appear for the plaintiff in the suit discovered about the middle of December 1902 that the bond by the Nabob contained the attestation of only one witness, and having regard to section 59 of the Transfer of Property Act, which required the attestation of at least two witnesses to every mortgage, telegraphed to the plaintiff "Mortgage suit law doubtful. Require your authority to "withdraw with liberty filing fresh suit." The plaintiff having authorised that course to be adopted, the suit was withdrawn on the 12th January 1903, the permission of the Court to sue again if so advised being granted. This permission, however, was not availed of by the plaintiff and he instead instituted the present suit some nineteen months afterwards, *i.e.*, on the 4th August 1904.

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Though in the plaint it was suggested that there had been a fraudulent misrepresentation by the defendant with reference to the supposed mortgage, no attempt was made to support this and the case proceeded before the learned Judge on the footing that both parties were ignorant of the fact that there was the attestation of only one witness to the instrument. In this view, the learned Judge held that the plaintiff was entitled to a return of the consideration paid by him.

Before proceeding to consider this decision, it is necessary to observe that the case of *The Madras Deposit and Benefit Society, Limited* v. *Oonnamalai Ammal*(1) goes too far in holding that non-compliance with the rule laid down in section 59 of the Transfer of Property Act as to attestations by witnesses to an instrument of mortgage of immoveable property renders the personal covenant to pay the debt void. It is difficult to see how non-compliance with the provisions of that section relating to a *transfer of an interest in immoveable property* by way of mortgage can have any further effect than to invalidate such intended transfer. With reference to bonds for money which purported also to mortgage immoveable property for the debts, but which were not registered as required by the Registration Act, it was held by all the High Courts that the non-registration did not affect the validity of the contract to pay the debt.

I can see no real difference between the two cases. I think, therefore, the decision of Maclean, Chief Justice, and Banerjee, J., in *Tofaluddi Peada* v. *Mahar Ali Shaha*(2) where they took a view different from that held in *Madras Deposit and Benefit Society, Limited* v. *Oonnamali Ammal*(1), lays down the correct rule. This being so, it follows that, the defect in the instrument executed by the Nabob to the defendants' firm, viz., the want of attestation by the required number of witnesses, would only have caused the failure of the suit No. 205 of 1900, in so far as the plaintiff claimed to proceed against the property intended to be mortgaged.

Turning now to the judgment of the learned Judge there is no reference in it whatsoever to the covenant referred to above on the part of the plaintiff as to the defendant's non-liability for any defect in what was assigned to him. Mr. Krishnaswami Aiyar

(1) I.L.R., 18 Mad., 29. (2) I.L.R., 26 Cal., 78.

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relied on *Motivahoo* v. *Vinayak Veerchand*(1). Assuming that that case, which was dealt with as governed by principles applicable to cases of specific performance, is not on that ground distinguishable from the present, where there has been a conveyance, there is no similarity between the two, for the condition in question there was that "the vendors shall not be bound to give any better title "to the purchaser than they themselves possessed; and the "purchaser shall take the premises sold with such title only as the "vendors could give him."

This was construed to imply a representation that the vendors had "some title" to give and as it was shown that they possessed none, it was held that the vendee was not bound to pay the balance of purchase money. The covenant here is wholly different, and the wide language employed covers every defect, flaw or blemish in the claim.

The suggestion by Mr. Krishnaswami Aiyar that the word 'claim' in the covenant should not be construed as extending to the supposed mortgage right, is on the face of it untenable, as, obviously, the term is used with reference to all grounds of claim whatsoever taken to exist in favour of the defendant as against the Nabob. It is thus perfectly clear that the covenant in question furnished a complete defence to the plaintiff's present suit. How this came to be passed over by the learned Judge is not apparent. It may be that the covenant was treated as immaterial in consequence of his finding that the mistake as to the existence of a valid mortgage was common to both the parties, and on the supposition that the transaction was therefore void, an inference which seems to be supported by the circumstance that the learned Judge relies on section 20 of the Contract Act in decreeing the recovery of the consideration found by him to have been actually paid by the plaintiff for the assignment.

If this inference be correct then the supposition that that section applied to the case and that the assignment was void, was clearly wrong, for whether a particular affirmation as to the quality of a specific thing sold is conditional and the transaction is to be null if the *affirmation* is incorrect, is only a question of intention of the parties to be decided by the circumstances of

(1) I.L.R., 12 Bom., 1.

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each case (*Gurney* v. *Womersily*(1), *Bannerman* v. *White*(2) and *Azemar* v. *Casella*(3). Where in addition to the affirmation there is a separate warranty also in the agreement, the existence of such separate warranty shows that the matter of the warranty is not a condition or essential part of the contract, but the intention of the parties was to transfer the property in the subject of the sale at all events. In such cases, if the sale is made in good faith and there is a breach of the warranty, the purchaser is entitled only to compensation for the breach of the warranty, and the sale is not even *voidable* (Pollock on 'Contract,' 7th edition, page 484); see also William on 'Vendors and Purchasers,' pages 732 and 540. The present is an *a fortiori* case inasmuch as the vendee has chosen to contract to take the claim with all its defects and to hold the vendor not responsible for the consequences.

This being so, it is not necessary to consider the other contentions urged on either side in the argument. I agree that the appeal should be allowed, the decree of the learned Judge reversed, and the suit dismissed with costs throughout.

The memorandum of objections fails and is also dismissed.

Messrs. *Grant & Greatorex* for attorneys for appellant.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

1907. January 7.

RAMAN CHETTI (DEFENDANT), APPELLANTS,

v.

THE MUNICIPAL COUNCIL OF KUMBAKONAM, (PLAINTIFF), RESPONDENT.*

District Municipalities Act (Madras) Act IV of 1884, *s.* 45—*Agreement not in accordance with section not binding on Municipality even though partly acted upon.*

An agreement falling within the scope of section 45 of the District Municipalities Act, is invalid if the provisions of the section have not been complied with and is not binding on either of the parties to it. The fact that such an agreement was partially acted upon, cannot render it an operative contract.

Ahmedabad Municipality v. *Sulemanji*, (I.L.R., 27 Bom., 618), followed.

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(1) E. & B. Rep., Vol. IV, 133, at p. (142). (2) 10 C.B. Rep. N.S., 844.
(3) L.R., 2, C.P.C., pp. 431, 677.

* Appeal No. 43 of 1904, presented against the decree of M.R.Ry. Y. Janaki Ramayya Sastri, Subordinate Judge of Tanjore, in Original Suit No. 23 of 1902.

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RAMAN CHETTI v. THE MUNICIPAL COUNCIL OF KUMBAKONAM.

SUIT by the Municipality of Kumbakonam to recover damages and arrears from the defendant, a toll contractor who had purchased at public auction the right of collecting tolls for three years. At the public auction the defendant offered the highest bid which was accepted. The defendant, though he entered on possession and was collecting tolls, did not execute the written agreement which was required by the provisions of section 45 of the Municipalities Act. Disputes arose between the plaintiff and defendant, and, after about seventeen months of enjoyment, the defendant was put out of possession and a resale of the remainder of the term resulted in a loss to plaintiff.

The plaintiff sues to recover the loss sustained, by the resale and the arrears due. The defendant pleaded *inter alia* that, there being no contract fulfilling the requirements of section 45, plaintiff's suit was unsustainable.

The Subordinate Judge held that the agreement, though not binding on the Municipality, was binding on the defendant and gave a decree for plaintiff.

Defendant appealed.

R. Satagopa Chariar, *P. R. Sundara Ayyar*, *E. Venkatarama Sarma* and *T. Narasimha Aiyangar* for appellant.

V. Krishnaswami Ayyar for respondent.

JUDGMENT.—The argument of Mr. Krishnaswami Ayyar that the Municipal Council of Kumbakonam, as at present constituted, is not liable to be proceeded against in this appeal, is unsustainable. Nor are we able to agree with his contention that, as the agreement on which the suit is based relates to the right to collect tolls, it is not an agreement to which section 45 of the District Municipalities Act applies.

The agreement between the Municipal Council and the appellant was, with reference to the amount involved, one which should have been effected in the manner prescribed in that section, and its provisions not having been complied with, the agreement is not valid. The view of the Subordinate Judge that it does not bind the Municipal Council but does bind the other party is erroneous (cf. *Ahmedabad Municipality* v. *Sulemanji*(1)). The fact that the agreement was partially acted upon cannot be held to

(1) I.L.R., 27 Bom., 618.

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RAMAN CHETTI. v. THE MUNICIPAL COUNCIL OF KUMBAKONAM.

render it an operative contract in spite of the provisions of the statute which have been violated.

The suit is based upon the agreement, and upon the agreement alone, and cannot be, to any extent, treated as a suit for money had and received. On the ground that the contract is invalid, the decree of the lower Court must be set aside and the suit dismissed. In the circumstances each party will bear his own costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

1907. January 16.

GUDARU KRISTNAYYA NAIDU (SECOND DEFENDANT), APPELLANT,

v.

MARADUGULA VENKATARATNAM AND OTHERS (PLAINTIFFS NOS. 1 TO 5), RESPONDENTS.*

Foreign Court, judgment of—Where party has submitted to jurisdiction, irregularities not affecting jurisdiction of the Court do not vitiate the judgment.

A party who has submitted to the jurisdiction of a foreign Court is bound by its judgment, when such judgment is within jurisdiction and does not offend the principles of natural justice. Irregularities which do not affect the jurisdiction of the Court do not vitiate such judgment even when they are such as will, in the view of the foreign Court, render the judgment there a nullity.

The judgment cannot be impeached on grounds which could have been but were not, taken in the foreign Court.

Pemberton v. *Hughes*, (L.R., [1899] 1 Ch., 781), referred to.

SUIT by the plaintiffs to recover 650 logs of timber alleged to have been purchased by the plaintiffs from the first defendant in the Bustar State on the 7th February 1902. The plaintiffs alleged that subsequent to the sale to them, the second defendant, in execution of a decree he had obtained against the first defendant in the foreign Court of Bustar, attached the timber which was then in Bustar State and the third defendant purchased such

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* Appeal No. 14 of 1904, presented against the decree of F. H. Hamnett, Esq., District Judge of Godavari, in Original Suit No. 28 of 1902.

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timber at the auction sale. The plaintiffs contended that the sale conferred no title in the third defendant, as the decree obtained in the foreign Court against the first defendant by the second defendant was not one which could be a bar under section 14 of the Code of Civil Procedure. The timber was subsequently brought to Rajahmundry by the third defendant and hence the suit in the District Court. The main question was whether the judgment of the foreign Court and the proceedings thereunder were nullities. The portion of the judgment of the lower Court dealing with this question was as follows :—

"A copy of the judgment was filed as exhibit XII and was admitted by all the parties to be a true copy. On the face of it the judgment shows that it was based on an award of arbitrators made without the consent of the defendant in that suit (first defendant in this suit) and that the award was not signed by one of the arbitrators to whom the Court referred the matter in the defendants' absence. The second defendant (who was plaintiff in that suit) admits that the present first defendant never submitted to the Court's reference to arbitration or to the award of the arbitrators. A decree based on such an award must, I hold on the face of it, be treated as a nullity in British Courts, as it is opposed to natural justice as well as to British law that a man should be bound by an award made by persons to whose decisions he has never consented to submit his dispute. If the first defendant had never submitted to the jurisdiction of the foreign Court, there is no doubt that, under international law, the judgment of the foreign Court would be treated as a nullity. The rulings are clear on this point. The present case is practically on all fours with such a case. Although the first defendant did originally submit to the jurisdiction of the foreign Court, he never submitted to the jurisdiction of the arbitrators who made the award, and it is really their award which is the Court's judgment. I hold, therefore, that exhibit XII cannot be recognized by this Court as a decree which second defendant could execute, and that the execution proceedings and sale in execution of it must equally with the decree be treated in this Court as nullities."

The lower Court passed a decree against the second and third defendants.

The second defendant preferred this appeal.

T. Rangachariar and *T. T. Thiruvenkatachariar* for appellant.

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GUDARU KRISTNAYYA NAIDU v. MARADUGULA VENKATA-RATNAM.

T. V. Seshagiri Ayyar and *T. V. Muthukrishna Ayyar* for respondents.

JUDGMENT.—There is no doubt that in the suit before the Bustar Court the first defendant appeared as a party and submitted to the jurisdiction of the Court. We are unable to agree with the suggestion that he appeared on the condition that the suit was to be decided by the arbitrators appointed on the first occasion. The words in the judgment relied on in support of this contention show only that after appearing he agreed with the then plaintiff to refer the matter to arbitration, as the more convenient way of settling the disputes between them having regard to their nature. The award submitted by the first set of arbitrators became void according to the rules of Procedure adopted by the Bustar Court which are the same in regard to this matter, as those contained in the Civil Procedure Code, and the dispute was then referred by the Court of its own motion to a second set of arbitrators. The first defendant was not present on this occasion and did not consent to this second reference. Assuming for argument that, under section 520 of the Code, or provision analogous thereto, it was not competent to the Court to appoint fresh arbitrators and that it ought itself to have tried the suit, that was not a matter which affected the jurisdiction of the Court which had been acquired over the first defendant by his submission to it. (*Pemberton* v. *Hughes*(1)), on which Mr. Rangachariar relies, is a clear authority against the view that the foreign judgment is not binding upon the parties thereto in British Courts, because the formalities of procedure which ought to have been observed by the foreign Court were not observed, even (according to Lindley, Master of the Rolls) in a case where the non-observance would, in the view of the foreign Court, have rendered the judgment there a nullity. Nor can we agree with the suggestion that the decision of the Bustar Court based upon the award of the second set of arbitrators is one that offends against natural justice. After the award was submitted by the second set of arbitrators notice was given to the parties to file objections thereto, but the first defendant made no objections. The same observation applies to the contention founded in the absence of one of the arbitrators on the day on which the award was drawn up, and in the absence of his signature to the award.

(1) L.R., [1899], 1 Ch., 781.

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These were objections which it was competent to the first defendant to raise in the Bustar Court and decision passed on his failure to do so cannot be impeached on those grounds in our Courts.

We, therefore, set aside the decree of the District Judge and remand the suit for the disposal of the other questions raised. Costs will abide and follow the result. Security lodged by the appellant in this Court will be refunded.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

1906. December 17.

SHEIK ISMAL ROWTHER AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

v.

RAJAB ROWTHER (PLAINTIFF), RESPONDENT.*

Sale in execution—Right of person deriving title from a purchaser at such sale—Such person's rights not affected by any error or fraud in procuring the decree—Decree passed under such circumstances only voidable not void.

A decree passed by a Court having jurisdiction over the subject-matter, is not void but only voidable when it is passed under a misapprehension or is brought about by fraudulent proceedings. The party against whom the decree is passed has only an equity to set aside the proceedings.

Where property sold in execution of such a decree is purchased by the decree-holder and by him sold for value to a third party who has no notice of any defect in the decree, the equitable right to set aside such decree cannot prevail against the rights of the subsequent purchaser for value without notice. A person claiming through a Court purchaser, is entitled to rely upon the plea that he is a *bonâ fide* purchaser for value without notice, though he cannot claim the rights of a stranger purchasing at a Court sale.

Marimuthu Udaiyan v. *Subbaraya Pillai*, (13 M.L.J., 231), followed.

SUIT by the plaintiff for a declaration that the plaint properties had not been affected by the execution proceedings and sale that took place in execution of the decree in Original Suit No. 29 of 1895 on the file of the District Court, Trichinopoly, and for recovery of the properties from defendants Nos. 2 and 3.

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* Second Appeal No. 826 of 1904, presented against the decree of J. Hewetson, Esq., District Judge of Trichinopoly, in Appeal Suit No. 105 of 1903, presented against the decree of M.R.Ry. S. Doraiswami Ayyar, District Munsif of Trichinopoly, in Original Suit No. 89 of 1902.

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SHEIK ISMAL ROWTHER v. RAJAB ROWTHER.

The first defendant and the plaintiff were respectively plaintiff and defendant in Original Suit No. 29 of 1895, which was adjusted by a compromise. According to the compromise the suit ought to have been dismissed; but the present first defendant put in a petition praying that a decree may be passed in terms of the compromise. Thereupon the Court without notice to the present plaintiff passed a decree against him on the 28th November 1895. In execution of the decree the plaint properties belonging to the plaintiff were attached and sold in June 1897. The first defendant purchased the properties and sold them to defendants Nos. 2 and 3 in May 1899.

The present plaintiff thereupon applied to the Court under section 206 of the Code of Civil Procedure to have the decree amended, and, on the 23rd March 1900, the amended decree was passed, after notice to the first defendant. The amended decree in Original Suit No. 29 of 1895 directed that the suit do stand dismissed. The present plaintiff thereupon applied under section 244 of the Code of Civil Procedure to be put in possession of the properties sold, but he was referred to a regular suit as the second and third defendants were not parties to the suit and section 244 applied only to parties to the suit or their representatives.

Hence the present suit.

The District Munsif dismissed the suit.

On appeal, the District Judge, while holding that the second and third defendants were purchasers for value without notice, decided in favour of the plaintiff on the ground that the decree in Original Suit No. 29 of 1895 and the sale thereunder, were absolute nullities.

The second and third defendants preferred this second appeal.

K. Ramachandra Ayyar for *S. Kasturiranga Ayyangar* for appellants.

A. Nilakanta Ayyar for V. *Krishnaswami Ayyar* for respondent.

JUDGMENT.—The appellants purchased the property in dispute from the first defendant, who was himself the purchaser in execution of a decree which he had himself obtained against the plaintiff on a compromise. The decree was passed on the 28th November 1895 and the Court sale was on the 23rd June 1897.

The appellants purchased in May 1899. Some months later the plaintiff applied to the Court which passed the decree to set it

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aside on the ground that, according to the terms of the compromise, no decree should have been passed in the terms in which it was drawn up, but that the compromise should have been recorded and the suit dismissed.

This application was granted, but the appellants were not parties to the proceedings. Both the Courts find that the appellants were *bonâ fide* purchasers for value without notice, but the lower Appellate Court decided that this was no ground for holding that the plaintiff was not entitled to dispossess them.

No doubt the appellants are not in the position of strangers who purchased at a Court sale in execution of a decree, so as to entitle them to the benefit of the rule laid down by the Privy Council in the case of *Zain-ul-abdin Khan* v. *Muhammad Asghar Ali Khan*(1). On the other hand they are obviously not in the position of a party to the decree itself who is bound to grant restitution on the decree being set aside.

The case of *Marimuthu Udaiyan* v. *Subbaraya Pillai*(2), is clear authority for the position that a party claiming through a Court purchaser is entitled to rely upon the plea that he is a *bonâ fide* purchaser for value, without notice.

We are unable to agree with the argument on behalf of the plaintiff that the decree originally passed was void. The Court had undoubtedly jurisdiction over the subject-matter, and any error as to the effect of the compromise would not render the decree void. Assuming that the first defendant in obtaining the decree had been guilty of misrepresentation or fraud, the proceedings were only voidable, and a *bonâ fide* purchaser from him is entitled to rely on his title as such. The plaintiff had only an equity to set aside the proceedings which were the result of fraud or misrepresentation, and that equity cannot be allowed to prevail against persons in the position of the appellants.

It is by no means clear that it was the duty of the appellants, when aware that their vendor's title was under a Court sale, to refer to the decree on which the sale was held; but, assuming that it was, we are unable to agree to the argument urged for the plaintiff that a reference to the decree as it stood before it was set aside would have shown any flaw in the title of the first defendant so as to fix the appellants with notice of the first defendant's fraud.

(1) I.L.R., 10 All., 166. (2) 18 Mad. L.J., 281.

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SHEIK ISMAL ROWTHER v. RAJAB ROWTHER.

We, therefore, set aside the decree of the lower Appellate Court as against the appellants (defendants Nos. 2 and 3) and restore that of the District Munsif with costs in this and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1907. February 26.

SUBBANNA BHATTA (PLAINTIFF), APPELLANT IN SECOND APPEAL No. 168 OF 1905,

v.

KUNHANNA BANTA AND OTHERS (DEFENDANTS), RESPONDENTS IN THE ABOVE CASE, AND

KUNHANNA BANTA (FIRST DEFENDANT), APPELLANT IN SECOND APPEAL No. 214 OF 1905,

v.

SUBBANNA BHATTA (PLAINTIFF), RESPONDENT IN THE ABOVE CASE.*

Limitation Act—Act XV of 1877, *sch. II, arts.* 62, 120—*Art.* 62 *applies to suits against benamidar by real owner to recover money received by the former.*

The period of Limitation for an action by the real owner against a benamidar to recover money received by the latter for the use of the former is that prescribed in schedule II, Article 62 of the Limitation Act. Article 120 does not apply to such a case.

Mahabali Bhatta v. *Kunhunna Bhatta*, (I.L.R., 21 Mad., 373), followed.

SUIT to recover amount collected by first defendant under a rent deed executed benami in the name of first defendant for the deceased father of plaintiffs. The suit was in respect of rent collected for the years 1888–96.

The rents for 1888–90 were collected by defendants more than six years prior to 2nd May 1902, when the plaint was presented; and the rents for subsequent years 1891–95 were actually collected by first defendant on 8th June 1896.

The Court of First Instance held the claim barred in respect of the rent for 1888–90 and passed a decree in favour of plaintiffs

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* Second Appeals Nos. 168 and 214 of 1905, presented against the decrees of P. J. Itteyerah, Esq., Subordinate Judge of South Canara, in Appeal Suits Nos. 136 and 112 of 1903, presented against the decree of M.R.Ry. A. C. Kannan Nambiar, District Munsif of Kasaragod, in Original Suit No. 147 of 1902.

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for the rent collected for 1891–96. Appeals were filed by both parties against the decree of the lower Court.

SUBBANNA BHATTA v. KUNHANNA BANTA.

The judgment of the lower Court was upheld in both the appeals.

Both parties appealed to the High Court.

M. Kunjunni Nair for *K. Narayana Rau* for appellant in Second Appeal No. 168 of 1905.

J. L. Rosario for first respondent.

J. L. Rosario and *M. Babu Rau* for appellant in Second Appeal No. 214 of 1905.

M. Kunjunni Nair for *K. Narayana Rau* for respondent.

JUDGMENT.—The facts show that the rent received by the first defendant was money payable by him as *benamidar* to the plaintiff the real owner for money received by the first defendant for the plaintiff's use, and therefore Article 62 of the Limitation Act applies. This was the decision in the case of *Mahabala Bhatta* v. *Kunhanna Bhatta*(1), and though a defferent view was taken in *Narayana Bhatta* v. *Mahabala Bhatta*(2) by the Subordinate Judge and Article 120 was held to be applicable, no reasons are assigned for applying that article rather than Article 62. The latter article has been applied to the case of a *benamidar* (as in the present suit) in *Sundar Lal* v. *Fakir Chand*(3), and to the case of a joint owner in *Mahomed Wahib* v. *Mahomed Ameer*(4), where the scope of Article 62 is very fully explained. Applying Article 62, the plaintiff's claim is barred, as the money was received by the first defendant more than three years prior to the suit.

We, therefore, allow the appeal of the first defendant (Second Appeal No. 214 of 1905), and dismiss the appeal of the plaintiff (Second Appeal No. 168 of 1905), and setting aside the decrees of the Courts below dismiss the suit with costs throughout.

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(1) I.L.R., 21 Mad., 373. (2) Second Appeal No. 1469 of 1901 (unreported).
(3) I.L.R., 25 All., 62. (4) I.L.R., 32 Calc., 527.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. February 6, 7, 20.

GOPALAN NAIR (SECOND PLAINTIFF), APPELLANT,

v.

KUNHAN MENON AND OTHERS (FIRST DEFENDANT, FIRST PLAINTIFF AND DEFENDANTS NOS. 2 TO 13), RESPONDENTS.*

Malabar Law, Kanom—Transfer of Property Act, Act IV of 1882, *ss.* 59, 98—*No notice necessary to determine Kanom right—Renewal of kanom can be effected only by registered deed—Document, construction of.*

The demisor in an instrument of kanom added at the end the words 'you shall obtain a renewed demise on the expiration of every twelve years and thus hold the kanom', and the corresponding kychit of the demise contained at the end the words 'I shall obtain a renewed demise on the expiration of every twelve years and thus hold the lands.' No mention was made of the rent payable on such renewals. No such renewal was made by a registered instrument although the demisee alleged that he had paid the renewal fees. In a suit by the demisor to redeem the *kanom*:

Held, that the document contained no covenant for perpetual renewal. *Held also*, that the transaction was not a mere lease, but was an anomalous mortgage under section 98 of the Transfer of Property Act, and no notice was required as in the case of leases to determine it.

Held further, that a renewal can only be effected by a registered instrument under section 59 of the Transfer of Property Act.

Kurri Veerareddy v. *Kurri Bapireddy*, (I.L.R., 29 Mad., 336), followed.

SUIT to recover with past and future rent eight items of immoveable property described in schedule A of the plaint and demised on a kanom of Rs. 600 by first plaintiff to first defendant's vendor Gangadara Iyen on 5th Dhanu 1064 (18th December 1888).

The second plaintiff was added as a co-plaintiff as he had obtained a melkanom from first plaintiff.

First defendant admitted the kanom demise granted in the name of Gangadara Iyen and stated that it contained a stipulation that the demisee should hold the lands on his taking a renewed demise at the end of every twelve years; that he (first defendant) purchased the right of Gangadara Iyen on payment of a premium

* Second Appeal No. 206 of 1904, presented against the decree of L. C. Miller, Esq., District Judge of South Malabar, in Appeal Suit No. 183 of 1903, presented against the decree of M.R.Ry. V. Kelu Eradi, District Munsif of Chowghat, in Original Suit No. 271 of 1902.

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of Rs. 510, that the first plaintiff was bound to renew the demise to him; that he has no right to recover the lands, and that the first plaintiff received from him (first defendant) Rs. 60 on 12th Kumbham 1076 (23rd February 1901) as renewal fee and promised to grant a renewed demise.

The District Munsif passed a decree for redemption in favour of second plaintiff. On appeal, the District Court reversed this judgment and dismissed the suit.

The second plaintiff appealed.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for appellant.

V. Krishnaswami Ayyar and *A. Nilakanta Ayyar* for first respondent.

JUDGMENT (BENSON, J.).—This is a suit to redeem a kanom demise. The District Munsif gave judgment for the plaintiff, but the District Judge held that the plaintiff's title to eject under the terms of the document had not been made out, and dismissed the suit. Against this decree the plaintiff appeals, and I think his appeal must prevail.

The question for decision is whether the instruments under which the property was demised limit the right of the plaintiff to redeem on the expiry of the term. The instruments are the kanom (exhibit 19) and the corresponding kychit (exhibit B). Both are in the ordinary form, but, at the end of the kanom, the demisor says "you shall obtain a renewed demise on the expiration of every twelve years and thus hold the properties," and at the end of the kychit the demisee says "I shall obtain a renewed demise on the expiration of every twelve years, and shall hold the lands thus." The District Judge has construed these words as an engagement by the plaintiff to grant a renewal on the expiration of every twelve years, thus, in effect, creating a permanent tenure in favour of the defendants.

I do not think that this is a correct construction of the words. I think that this stipulation was inserted for the protection of the demisor, not for the benefit of the demisee. The demisor does not bind himself to grant a renewal every twelve years, but he binds the demisee to obtain a formal renewal every twelve years as a condition of his being allowed to hold the lands. He thus declares his title to the payment of the customary renewal fees every twelve years. It is true that the customary law of Malabar

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attaches the right to obtain certain renewal fees every twelve years as an incident of a kanom demise, but the expression of such a right in the demise does not alter its character or convert the tenure into a permanent one. The vakil for the defendants attempts to support the decree of the District Judge by contending that the transaction should be regarded simply as a lease, renewable every twelve years, and that, in the absence of a legal notice to quit, his client cannot be ejected. There was no suggestion in the Courts below that the transaction should be regarded merely as a lease, and no question of notice was raised or enquired into. Apart, however, from this, I think, that there is no ground for regarding it as a mere lease and subject to the technical incidents of a lease with regard to notice.

The vakil for the respondent has not been able to refer us to any case in which such a document has been treated as a lease in which the demisee holding over after the expiry of the term has been held to be entitled to notice. The document (exhibit 19) on the face of it purports to evidence a kanom demise. This is an anomalous mortgage within the meaning of section 98 of the Transfer of Property Act (*Raman Nair* v. *Vasudevan Namboodripad*(1)) with certain well-known incidents attached to it by the customary law of Malabar. In such a mortgage "the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed, and, so far as such contract does not extend, by local usage." (Section 98 of the Transfer of Property Act.) There is no authority for holding that such a demise cannot be redeemed on the expiry of the customary term of twelve years without notice. On the contrary, such right of redemption is well recognized by the customary law of Malabar, and the demisor is not under any obligation to renew the demise. The respondent in the present case pleaded that he had paid the renewal fees. The District Munsif found the plea to be false and it is not clear that the District Judge found otherwise. But this would make no difference as to the plaintiff's right to redeem. Both by the express terms of the document, and in accordance with the principles laid down in the recent Full Bench case (*Kurri Veerareddi* v. *Kurri Bapireddi*(2)) the demisee, even if in possession of the property, and even if he has made an agreement to renew

(1) I.L.R., 27 Mad., 26. (2) I.L.R., 29 Mad., 336.

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he demise, cannot resist the suit for redemption unless he has ctually obtained a renewed demise registered in accordance with aw, and this he admittedly has not obtained. I regard the question whether renewal fee has been paid or not as undecided n this suit, and, as the payment was not pleaded as a set off, it is outside the scope of this suit and does not require to be further lealt with by me.

I would therefore set aside the decree of the District Judge nd restore that of the District Munsif with costs in this and n the lower Appellate Court. Time for redemption will be xtended to six months from this date.

WALLIS, J.—I have come to the same conclusion. A kanom, t has been held in *Silapani* v. *Ashtamurti Nambudri*(1), parakes of the nature of a lease as well as a mortgage, and this vould certainly appear to be so where, as in the present case, the ent reserved, and the kanom advance are both substantial sums. The validity of a covenant for perpetual renewal in a lease has ong been established in England, and I do not see why such a ovenant in a kanom, which appears to be not unusual in Malabar, hould not be enforced at any rate in the case of kanoms entered nto since the coming into force of the Transfer of Property Act vhich are anomalous mortgages within the operation of section 98. uch a covenant was upheld by this Court in Second Appeal No. 564 of 1890 (unreported), which was an appeal from a udgment in which perpetual kanom was stated to be a wellnown tenure in Malabar. This case does not appear to have een cited in *Murthi Khandan* v. *Anantanarayana Patter*(2), nd, in any case, the latter decision only applies to kanoms ntered into before the coming into force of the Transfer f Property Act. Such a covenant is, however, a serious derogation from the rights of the landowner whether he be regarded s mortgagor or as lessor, and numerous authorities in England ave in the language of Lord Selborne L.C. in *Swinburne* v. *Milburn*(3) imposed upon any one claiming such a right the urden of strict proof and are strongly against inferring it from ny equivocal expressions which may fairly be capable of being therwise interpreted.

(1) I.L.R., 3 Mad., 383. (2) 16 Mad., L.J., 462.
(3) L.R., 9 A.C., 844.

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The kanom (exhibit 19) provides that at the expiration of every twelve years "you must or (it is necessary for you) to obtain a renewed kanom and thus hold the properties," and corresponding words are to be found in the kychit, exhibit B, executed by the kanomdar. The District Munsif has held that all the parties intended was to express in writing the customary incident of kanom tenure by which a kanomdar is not entitled to continue in possession and resist redemption for more than twelve years unless he obtains a new kanom upon terms which usually include the payment of a renewal fee, and may or may not vary the rent previously reserved. In the present case there is no provision as to the terms on which the renewal is to be granted, and it would, in my opinion, be straining the language of the deed to read it as a covenant to grant a perpetual renewal on payment of the customary renewal fee about which nothing is said, and at the old rent. The absence of any such provisions is, in my opinion, a strong indication that it was not the intention of the parties that the jenmi should be deprived of his right of redemption and reversion at the end of the kanom period of twelve years, and, on the whole, adopting the test above laid down, I am of opinion that the language used is not sufficiently unequivocal to justify us in holding that it amounts to a covenant for perpetual renewal.

It is next contended for the respondent that the kanomdar has been allowed to hold over after the expiration of the kanom period, and so must be treated as a tenant from year to year, and cannot be ejected except on due notice. Even though when analysed, kanom tenure may partake of the nature of leasehold, that is no reason for importing into it the rules of English law as to holding over. There is no authority for the proposition that a kanomdar who has been allowed to continue in possession after the twelve years must be treated as a tenant from year to year and entitled to notice as such. On the contrary, such a principle appears to be quite unknown in Malabar, and this contention must therefore be overruled.

It is in the next place contended that the jenmi has accepted a renewal fee from the kanomdar and, that, therefore, he is entitled to continue in possession for a further term. The District Munsif found that no renewal fee had been paid, but there is no finding on the question in the judgment of the lower Appellate Court. It is, however, in my opinion, unnecessary to call for a finding,

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because even supposing a renewal fee to have been paid, that would not, in my opinion, help the defendant in this suit. Receipt of a renewal fee would of course evidence an agreement for a renewed kanom, and such an agreement accompanied by possession would in equity be considered as placing the kanomdar in the same position as if he had obtained a renewed kanom. This principle of equity can, however, only be given effect to in this country, so far as it is compatible with the Transfer of Property Act, see the remarks of Bhashyam Ayyangar, J., in *Ramasami Pattar* v. *Chinnan Asari*(1). A kanom, as has been often held, is an anomalous mortgage, and, as a mortgage, requires registration under section 59 of the Transfer of Property Act. Consequently, according to the decision in *Kurri Veerareddi* v. *Kurri Bapireddi*(2), possession under an agreement for a mortgage cannot be relied on in the absence of a registered instrument. This contention therefore must also be disallowed.

GOPALAN NAIR v. KUNHAN MENON.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

1907. January 25.

KANDATH VEETTIL BAVA *alias* AVUTHALA (PLAINTIFF), APPELLANT,

v.

MUSALIAM VEETTIL PAKRUKUTTI AND OTHERS (FIRST DEFENDANT, SECOND DEFENDANT'S LEGAL REPRESENTATIVES AND DEFENDANTS NOS. 3 TO 5), RESPONDENTS.*

Muhammadan Law—Gift—Nature of possession necessary to constitute a valid gift —Residence of donor—mother with daughter—donee does not make gift invalid.

Under Muhammadan Law, to constitute a valid gift, possession must pass to the donee.

Where a house and lands were given as a gift by a Muhammadan mother to her daughter and the daughter was put in exclusive possession of the lands and her

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(1) I.L.R., 24 Mad., 449 at p. 466. (2) I.L.R., 29 Mad., 336.

* Second Appeal No. 946 of 1904, presented against the decree of M.R.Ry. S. Raghunathaiya, Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 40 of 1904, presented against the decree of M.R.Ry. V. Raman Menon, District Munsif of Ponali, in Original Suit No. 515 of 1902.

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title to both properties was perfected by mutation of names in the register, the mere fact that the mother continued to reside with her daughter, will not constitute a non-delivery of possession which will invalidate the gift.

Bava Sahib v. *Mahomed*, (I.L.R., 19 Mad., 343), distinguished.

Humera Bibi v. *Najm-un-Nissa Bibi*, (I.L.R., 28 All., 147), followed.

SUIT to recover the amount due on a hypothecation bond executed to the plaintiff by the first defendant in March 1897.

One *K*, a Muhammadan now deceased, who was the sister of the first defendant and the mother of the fourth defendant, originally owned the properties hypothecated by first defendant. *K* gave the properties consisting of a house and lands to fourth defendant as sridhanam and effected a mutation of names in the revenue register in 1885. *K* continued to live with both the defendants in the house till her death, but the lands were exclusively enjoyed by the fourth defendant.

The fourth defendant contended that the first defendant had no interest in the properties mortgaged and that the mortgage to plaintiff was inoperative.

The District Munsif held that the gift to the fourth defendant by *K* was invalid under the Muhammadan Law, as possession was not given to the fourth defendant; that the properties belonged to *K* till her death, and that the first defendant as *K's* brother was entitled to a share in them. He accordingly gave a decree against such share in favour of the plaintiff. On appeal, the District Judge held that the mere residence of *K* with her daughter, the fourth defendant, was not inconsistent with delivery of possession; that the gift was thus valid and first defendant had no interest in the properties. He accordingly dismissed the suit.

Plaintiff appealed to the High Court.

Mr. *K. S. Menon* for appellant.

K. P. Govinda Menon for second to fifth and eighth and ninth respondents.

JUDGMENT.—The point taken on behalf of the appellant is that as the donor, the mother of the donee, continued to reside with the donee in a part of the property given, a house and paramba, the gift so far as the house is concerned is invalid under the Muhammadan Law. This point was not made the subject of an issue in the lower Courts and the Subordinate Judge refers to it apparently as among the arguments urged before him at the hearing of the appeal.

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The appellant's counsel relies on *Bava Sahib* v. *Mahomed*(1). Though in that case the language of the Court is somewhat wide, we cannot say that it was then intended to lay down the rule that the residence of the donor in a house given, would in circumstances like the present be a ground for invalidating the gift if its truth is established, and the transfer of possession made out by sufficient evidence.

We think the learned Judges intended to suggest that the donor's possession after the alleged gift, would be evidence that the gift was incomplete.

In *Humera Bibi* v. *Najm-un-Nissa Bibi*(2) the question was fully considered and we agree with the view therein adopted.

The question is therefore whether in the present instance the residence of the mother along with the daughter is sufficient to detract from the value of the evidence that there was a completed gift and transfer of possession. We have no doubt that the answer should be in the negative.

The gift is evidenced by a petition presented to the Revenue authorities by the donor and donee, for the purpose of effecting a mutation of names. It is not denied that exclusive possession of the paramba itself passed to the donee, and we agree with the Subordinate Judge that, in the circumstances, the subsequent residence of the mother with her daughter is explained by the relationship of the parties and is not inconsistent with the view that possession of the whole of the property actually passed.

We dismiss the appeal.

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(1) I.L.R., 19 Mad., 343. (2) I.L.R., 28 All., 147.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

1907. January 28, 29.

VELAGA MANGAMMA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

BANDLAMUDI VEERAYYA (SECOND DEFENDANT), RESPONDENT.*

Limitation Act, XV of 1877, *sch. II, arts.* 118, 141—*When suit is for possession, art.* 141 *and not art.* 118 *applies.*

Article 118 of schedule II of the Limitation Act applies only to declaratory suits in respect of adoption and not to suits for possession of immovable property. The period of limitation applicable to the latter class of suits is that prescribed by article 141 of schedule II of the Limitation Act.

Thaukur Tirbhuwan Bahadur Singh v. *Raja Rameshar Bakhsh Sing,* (L.R., 33, I.A., 156), followed.

SUIT to recover plaint lands with mesne profits.

The plaintiffs were the daughters of one Pitchanna to whom the properties admittedly belonged. The plaintiffs' case was, that Pitchanna died in 1891 and his widow who succeeded him died on the 19th July 1902, and that they as the daughters became entitled to the properties. The suit was instituted on 31st July 1902.

The second defendant alleged that he was adopted by Pitchanna in his lifetime; that he succeeded to the property on Pitchanna's death and that the widow did not question his right. On the facts he contended that the plaintiffs' suit brought more than 6 years after his alleged adoption was set up against the widow, was barred by limitation.

The reliefs sought by the plaintffs were, (1) to establish their right to the plaint property, (2) to recover possession.

The District Munsif held that the adoption of second defendant was not proved, that the suit was not barred and decreed the plaintiffs' claim.

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* Second Appeal No. 995 of 1904, presented against the decree of M. D. Bell, Esq., District Judge of Kistna, in Appeal Suit No. 775 of 1903, presented against the decree of M.R.Ry. N. Somayajulu Sastrulu, District Munsif of Guntúr, in Original Suit No. 304 of 1902.

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VELAGA MANGAMMA v. BANDLAMUDI VEERAYYA.

The District Judge held that the suit was barred by article 118 and dismissed the suit. The material portion of the judgment is as follows:—

"It is urged in appeal that the adoption was set up before Pitchanna's death, that this was known to Pitchanna's widow and that as no suit has been brought to have the alleged adoption declared invalid, the present suit cannot stand.

I am of opinion that this contention must prevail. It is admitted that the adoption was set up on Pitchanna's death. Exhibit I (Register of Pattadars) shows that Pitchanna left a widow and an adopted son (appellant) and that the latter was entered in the accounts as Pitchanna's successor. The widow objected but the Tahsildar decided against her. She took no steps to have the alleged adoption set aside but acquiesced in the recognition of the appellant as Pitchanna's heir by virtue of his adoption. The plaintiffs claim through their mother within the meaning of section 3 of the Limitation Act. They must moreover, have themselves been aware of the alleged adoption and have not gone into the witness box to deny that they were. It seems clear to me that the suit is barred."

Plaintiffs appealed to the High Court.

T. R. Venkatarama Ayyar for the Hon. Mr. *P. S. Sivaswami Ayyar* for appellants.

S. Srinivasa Ayyar for *V. Krishnaswami Ayyar* for respondent.

JUDGMENT.—The respondent claims to be the adopted son of one Pitchanna who died in 1891. The adoption is alleged to have taken place in Pitchanna's life time. Pitchanna left a widow who died on the 19th of July 1902. The plaintiffs are the daughters of Pitchanna and sue to recover possession of their father's estate as his heirs on the death of their mother. The suit was instituted on the 31st of July 1902, and at its date the respondent was in possession of the property. There is a dispute whether he was in possession during the widow's life time or not but there is no finding on that point.

The lower Appellate Court has disposed of the suit on the ground that it is barred by limitation. It has been contended by appellants that the view that even a suit for possession in cases such as the present where the validity of an adoption has to be determined is governed by article 118 of the second schedule of Act XV of 1877, has been overruled by the recent decision of the

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VELAGA MANGAMMA v. BANDLAMUDI VEERAYYA.

Judicial Committee in *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh*(1).

We think this contention must be accepted. No doubt the point is not decided in so many words in their Lordships' judgment but the contention that article 118 was applicable to a suit instituted after Act XV of 1877 came into force, though the suit was one for possession, was raised by Mr. Cohen on behalf of the appellant before the Privy Council, but was opposed on behalf of the respon dent it being urged by Mr. DeGruyther that that article was applicable only to declaratory suits. Mr. Cohen appears to have abandoned his first contention and to have admitted that "if the Act of 1877 applied his client was out of Court."

Mr. Srinivasa Ayyar on behalf of the respondent suggested that this admission was due to the fact that the plaintiff was a minor until 3 years before the date of the suit and article 118 would not have been a bar as the suit was in time even assuming that he had acquired knowledge of the adoption more than six years before its institution.

This explanation cannot in our opinion be accepted. No reference whatever is made to it either in the arguments of Counsel or in the judgment of the Committee, and the plaintiff was claiming as the heir of the proprietress who made the adoption and who was absolute owner of the property claimed and her knowledge must be taken as knowledge affecting him as claiming through her.

We have no doubt that the admission by Mr. Cohen which was accepted as sound by their Lordships was on the ground that article 118 of the present Limitation Act was applicable only to declaratory suits and not to a suit like the present for possession. The article applicable to this case is therefore article 141, and the suit instituted within 12 years of the death of Pitchanna's widow is in time.

We must therefore set aside the decree of the District Judge and remand the appeal to him for disposal according to law. Costs will abide and follow the result.

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(1) L.R., 33, I.A., 156.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Wallis.

RAMA AIYAR AND ANOTHER (PETITIONERS), APPELLANTS,

v.

VENKATACHELLA PADAYACHI (RESPONDENT), RESPONDENT.*

1906. December 20. 1907. January 18.

Criminal Procedure Code, Act V of 1898, s. 195—On appeal against order granting sanction District Court has no power to remand for further inquiry—Section 647 of the Civil Procedure Code does not apply to proceedings under s. 195 of the Criminal Procedure Code—Letters Patent, cl. 15—Judgment, what is.

An order of a single Judge rejecting a revision petition presented under section 622 of the Civil Procedure Code on the ground that the objection taken therein is unfounded is a 'judgment' within the meaning of clause 15 of the Letters Patent and appealable as such. The powers conferred under section 195 of the Criminal Procedure Code are of a very special nature and no inherent jurisdiction can be attributed to any Court in the exercise of such powers, unless it is incident to their proper exercise. A Court to which an appeal is presented against an order granting or refusing sanction under section 195 of the Code of Criminal Procedure has no power to remand the case for a fresh inquir .

Section 647 of the Code of Civil Procedure does not make the provisions of the Code of Civil Procedure applicable to proceedings under section 195 of the Code of Criminal Procedure.

THE facts necessary for this report are set out in the judgment.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for appellants.

K. S. Ramaswami Sastri for *K. Srinivasa Ayyangar* for respondent.

JUDGMENT.—A preliminary objection has been taken that no appeal lies in this case under section 15 of the Letters Patent. It is settled by authority in this Court that an appeal lies against the decision of a single Judge whenever it amounts to a judgment (*Chappan* v. *Moidin Kutti*(1)) and that the order of a single Judge interfering in revision is an appealable judgment (*Chappan* v. *Moidin Kutti*(1)). As to cases where a single Judge declines to interfere in revision, it has been held in some cases that no appeal lies (*Sriramulu* v. *Ramasam*(2), *Venkatarama Ayyar* v. *Madalai*

* Appeal No. 74 of 1906 presented under section 15 of the Letters Patent against the order of Mr. Justice Benson in Civil Revision Petition No. 526 of 1906.

(1) I.L.R., 22 Mad., 68. (2) I.L.R., 22 Mad., 109.

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Ammal(1), *Puthukudi Abdu* v. *Puvakka Kunhikutti*(2) and *Chinnasami Mudali* v. *Arumuga Goundan*(3)). On the other hand, an appeal has been held to lie in two such cases by Moore and Sankaran Nair, JJ., in *Pachoomeean Sahib* v. *Kadir Hussain*(4) and by the Chief Justice and Miller, J., in *Appanna* v. *Ramanadhan*(5) and we have been referred to other cases in which such appeals have been heard without objection. In the present case the learned Judge rejected the revision petition on the ground that the objection therein taken to the jurisdiction of the lower Appellate Court to pass the order in question was unfounded. This, in our opinion, was a judgment and appealable.

The question raised was whether, when an application for sanction to prosecute comes before the District Judge on appeal from the District Munsif under section 195, Criminal Procedure Code, the District Judge has jurisdiction to direct the District Munsif to take fresh evidence. The learned Judge has held that the District Judge has inherent jurisdiction to pass such an order. The powers conferred under section 195, Criminal Procedure Code, are of a very special nature, and no inherent jurisdiction can, in our opinion, be attributed to any Court in the exercise of such powers, unless it is incident to their proper exercise. In *Kunhali Kutti* v. *Avaran Kutti*(6) followed in *Chinnakannu* v. *Nainar Adaviar*(7) it has been held that the District Judge has no power to remand the case to the District Munsif for a fresh enquiry, and it does not appear to us that jurisdiction to direct the District Munsif to take fresh evidence is necessarily incident to the exercise of the appellate jurisdiction conferred by section 195, Criminal Procedure Code.

Such a power is expressly conferred upon Appellate Courts by sections 568 and 569, Civil Procedure Code, and it has been argued before us that section 647, Civil Procedure Code, makes these sections applicable to proceedings before Civil Courts under section 195, Criminal Procedure Code. We do not think, however, that the effect of section 647, Civil Procedure Code, is to make the

(1) I.L.R., 23 Mad., 169. (2) I.L.R., 27 Mad., 340.
(3) I.L.R., 27 Mad., 432.
(4) L.P.A., No. 16 of 1905 (unreported).
(5) L.P.A., No. 64 of 1904 (unreported).
(6) L.P.A., Nos. 13 and 14 of 1904 (unreported).
(7) L.P.A., No. 37 of 1906 (unreported).

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provisions of the Civil Procedure Code, applicable to proceedings under section 195, Criminal Procedure Code which are of a criminal rather than of a civil nature. It was no doubt suggested in *In re Chennanagoud*(1) that proceedings under section 195, Criminal Procedure Code, before Judges of Civil Courts might be revisable under section 622, Civil Procedure Code. The decision, however, was that such proceedings were not revisable under the Criminal Procedure Code. We are not prepared to question the correctness of that decision which has since been followed in *Saling Ram* v. *Ramji Lal*(2), but we do not think it follows that proceedings under section 195, Criminal Procedure Code, which are of a criminal rather than of a civil nature can be held to come within section 647, Civil Procedure Code, when had before a Judge of a Civil Court.

RAMA AIYAR *v.* VENKATA-CHELLA PADAYACHI.

We accordingly reverse the decision of the learned Judge, set aside the order of the District Judge and remand the case for disposal according to law.

We make no order as to costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Wallis.

1907. January 24. February 6.

IZHUVAN RAMAN'S SON MUTHU (FIRST DEFENDANT—FIRST RESPONDENT), APPELLANT,

v.

IZHUVAN CHATHU'S SON KARUPPAN AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2 TO 12 AND TWELFTH DEFENDANT'S LEGAL REPRESENTATIVE), RESPONDENTS.*

Transfer of Property Act, Act IV of 1882, *s.* 99—*Equitable principles of s.* 99 *not applicable against a purchaser not the mortgagee and not a party to the suit in which property was sold—Sale in contravention of s.* 99 *only voidable, not void—Civil Procedure Code—Act XIV of* 1882, *s.* 244, *bar to parties questioning sale.*

The equitable right of the mortgagor to redeem property brought to sale in contravention of section 99 of the Transfer of Property Act by the mortgagee,

* Civil Miscellaneous Appeal No. 80 of 1906, presented against the decree of J. H. Munro, Esq., District Judge of South Malabar, in Appeal Suit No. 56 of 1906, presented against the decree of M.R.Ry. S. Raghunathaiya, Subordinate Judge of South Malabar at Palghat, in Original Suit No. 9 of 1905.

(1) I.L.R., 26 Mad., 139. (2) I.L.R., 28 All., 554.

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MUTHU v. KARUPPAN.

cannot arise when the auction purchaser at such sale is not the mortgagee, and is no party to the suit in which the property was sold.

Mayan Pathutti v. *Pakuran*. (I.L.R., 22 Mad., 347), distinguished. Such a sale is only voidable, not void. Parties to the suit must question the validity of the sale in execution, and a separate suit will be barred by section 244 of the Code of Civil Procedure.

SUIT to redeem. The facts of the case are fully stated in the judgment of the lower Appellate Court which is as follows:—

"The plaintiffs appeal. The only question is whether the suit is barred by section 244, Civil Procedure Code. The plaintiffs are the sons of tenth defendant. The tenth defendant executed a usufructuary mortgage of the suit properties in favour of defendants Nos. 3 and 4, and subsequently took back the properties on lease. The fourth defendant sued the tenth defendant and plaintiffs for possession with arrears of rent, and got a decree. In execution, the equity of redemption was sold and purchased by the fourth defendant. The sale was duly confirmed. The plaintiffs now sue to redeem. The Subordinate Judge has taken the view that before plaintiffs can redeem they must get the sale set aside, and that the sale can only be impeached in execution proceedings. He has therefore held the suit to be barred by section 244, Civil Procedure Code. He relies upon *Mayan Pathutti* v. *Pakuran*(1). The suit in that case was to set aside a sale, and section 244 was held to bar such a suit. The same decision points out however that the mortgagors might still be entitled to redeem notwithstanding the sale and its confirmation—see also *Erusappa Mudaliar* v. *Commercial and Land Mortgage Bank, Limited*(2). The present suit is not a suit to set aside the sale, but a suit to redeem, and I am of opinion that it is not barred by section 244, Civil Procedure Code. This appeal is, therefore, allowed, and the suit remanded under section 562, Civil Procedure Code, for disposal on the merits."

First defendant appealed to the High Court.

The Hon. Mr. *P. S. Sivaswami Ayyar* and *C. V. Anantakrishna Ayyar* for appellant.

V. Krishanswami Ayyar and *A. Nilakanta Ayyar* for respondents.

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(1) I.L.R., 22 Mad., 347. (2) I.L.R., 23 Mad., 377.

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MUTHU v. KARUPPAN.

JUDGMENT.—This is a suit for redemption instituted by the sons of the mortgagor defendant No. 10. Defendant No. 10 executed a usufructuary mortgage and then took the mortgaged lands on lease from the mortgagees. They subsequently obtained a decree against him and his sons the present plaintiffs for arrears of rent and brought the mortgaged lands to sale in execution of this decree when they were purchased by defendant No. 4. The action of the mortgagees in bringing the mortgaged property to sale in execution of this decree for rent was in clear contravention of section 99 of the Transfer of Property Act, and on this ground the plaintiffs claim to be entitled to redeem defendant No. 1. The Court of first instance held that they ought to have objected to the sale by proceedings in execution, and that their right of suit was barred by section 244, Civil Procedure Code. The lower Appellate Court held that although a suit to set aside the sale would be barred under section 244, a suit for redemption would not.

In support of this view he relied on certain observations in *Mayan Pathutti* v. *Pakuran*(1). These observations which are based on the decision in *Martand* v. *Dhondo*(2), and also the subsequent case of *Erusappa Mudaliar* v. *Commercial and Land Mortgage Bank, Limited*(3) go to show that the mortgagor may preserve his right to redeem property brought to sale in contravention of section 99, Transfer of Property Act, even if he fails to object in execution where the mortgagee is himself the auction purchaser, on the ground that a mortgagee cannot by such a sale and purchase in contravention of law be allowed to free himself from the liability to be redeemed. No such equity can in our opinion arise against an auction purchaser who was not the mortgagee and was no party to the suit. According to the view taken by this Court the sale in contravention of section 99, Transfer of Property Act, was voidable only and not void, *Mayan Pathutti* v. *Pakuran*(1) and it was open to the present plaintiffs who were parties to the suit to set it aside in execution, and as they have not done so, their present suit is barred by section 244, Civil Procedure Code. The appeal is allowed with costs in this and the lower Appellate Court.

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(1) I.L.R., 22 Mad., 347. (2) I.L.R., 22 Bom., 624.
(3) I.L.R., 23 Mad., 377.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1906. November 6. 1907. January 8, 9, 22.

RAJAGOPALAN, MINOR BY MOTHER AND GUARDIAN LAKSHMI AMMAL (DEFENDANT), APPELLANT,

v.

KASIVASI SOMASUNDARA THAMBIRAN (PLAINTIFF), RESPONDENT.*

Transfer of Property Act, Act IV of 1882, *s.* 119—*Breach of condition constituting cause of action under s.* 119 *of the Transfer of Property Act, arises at date of final decree on appeal—Limitation Act, XV of* 1877, *s.* 10—*Does not apply in suits against assignees for valuable consideration.*

A, the trustee of a temple, exchanged certain temple lands with *B* and obtained certain lands from *B* in exchange. *C* brought a suit against *A* to recover the land obtained by *A* in exchange from *B* and possession was decreed in favour of *C*, and *A* was deprived of possession in execution of the decree on 18th December 1890. *A* preferred appeals successively to the District Court and to the High Court and the decree was confirmed on second appeal on the 23rd February 1892. On the 22nd February 1904, *A's* successor brought a suit against *B* to recover the lands got by *B* from *A* :

Held, that the dispossession of plaintiffs which entitled him to bring a suit under section 119 of the Transfer of Property Act must be held to have taken place only when the decree for possession against him was confirmed on second appeal by the High Court:

Held further, that section 10 of the Limitation Act did not apply to the suit. The section proceeds upon the well-known distinction between transfers for valuable consideration and voluntary transfers and the transfer in this case is not the less a transfer for valuable consideration, because the consideration subsequently failed.

Section 10 does not deprive transferees for valuable consideration of the benefits of the statute.

Bassu Kuar v. *Dhum Singh*, (I.L.R., 11 All., 47), followed.

Hanuman Kamat v. *Hanuman Mandur*, (I.L.R., 19 Calc., 123), distinguished.

Tulsiram v. *Murlidhar*, (I.L.R., 26 Bom., 750), distinguished.

SUIT for land.

The facts necessary for the purposes of this report are stated in the judgment.

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* Civil Miscellaneous Appeal No. 44 of 1906, presented against the order of M.R.Ry. M. Visvanatha Ayyar, Subordinate Judge of Negapatam, in Appeal Suit No. 834 of 1905 (Original Suit No. 95 of 1904, District Munsif's Court of Valangiman).

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The Hon. Mr. *P. S. Sivaswami Ayyar* and *T. R. Venkatarama Sastriar* for appellant.

P. R. Sundara Ayyar for respondent.

JUDGMENT.—This is a suit instituted by a temple trustee under section 119 of the Transfer of Property Act to recover back land exchanged by a former trustee for other land of which the temple has since been deprived owing to defect of title. Shortly after the exchange which was effected by exhibit A dated the 16th June 1888, a suit for the recovery of the land conveyed to the temple under this deed was instituted by a third party claiming under a paramount title; judgment was given for the plaintiff who obtained possession from the temple in execution of the original decree on the 18th December 1890. Successive appeals were preferred to the District Court and to the High Court, but the original decree was finally confirmed by decision in Second Appeal No. 91 of 1891, dated the 23rd February 1892.

The present suit was instituted on the 22nd February 1904, within twelve years of the latter date; but more than twelve years from the 18th December 1890, when the temple was deprived of possession. The District Munsif held that the suit was barred under article 144 starting from the latter date. The Sub-Judge agreed that the suit would be barred if the Limitation Act applied, but reversed the judgment on the ground that the case came within the exception in favour of trust property in section 10.

The suit, he held, was one for the purpose of following temple property in the hands of an assignee from the temple trustee, and such assignee could not claim to be an assignee for valuable consideration, because he proved to have had no title to the property which he gave in exchange for the temple property.

We cannot agree with this view. In our opinion the section proceeds upon the well-known distinction between transfers for valuable consideration and voluntary transfers. The transfer in this case cannot in our opinion be held to be a voluntary transfer merely because the very substantial consideration afterwards failed, and we think the transferee is not excluded by section 10 from the benefit of the statute.

Assuming the Limitation Act does apply it was contended for the respondent and not disputed for the appellant that article 143 was applicable as when the plaintiff was deprived of the property transferred to him by the defendant, this constituted a breach of

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the statutory condition, on which, under section 119 of the Transfer of Property Act, the defendant was entitled to retain possession of the property transferred to him by the plaintiff. It was, however, argued for the appellant that assuming this article to apply, the breach of condition must be considered as having taken place on the 18th December 1890, the date on which the plaintiff was put out of possession in execution of the decree of the Court of First Instance in the suit against the present plaintiff, whereas it was contended for the respondent that the deprivation under the decree of the Court of First Instance was only conditional, that the effect of the appeal against that decree was to reopen the decision and render all the questions in the suit *sub judice* and that the plaintiff cannot be considered to have been dispossessed until the rejection on the 23rd February 1892 of the second appeal against the decree. The appellant relied on the decision of the Privy Council in *Hanuman Kamat* v. *Hanuman Mandur*(1) and in *Tulsiram* v. *Murlidhar*(2).

In these cases it was held that the plaintiff's right to sue on the failure of consideration arose when he found himself resisted in obtaining possession of the property for which he had stipulated; that time began to run from this point and that there was nothing in the fact of his having subsequently taken unsuccessful proceedings against the persons obstructing him to stop time running on the cause of action for failure of consideration or give him a fresh starting point. In the present case, on the other hand, the plaintiff, in the first instance, obtained possession of the property for which he had stipulated and was deprived of it in a suit subsequently instituted against him and the question is as to the time when he is to be considered to have been deprived of it so as to give him his present cause of action. This question did not at all arise in the two cases cited. The respondent, on the other hand, relied mainly on the decision of the Privy Council in *Bassu Kuar* v. *Dhum Singh*(3). That was a suit brought to recover money paid by the plaintiff as vendee of certain land. Disputes having subsequently arisen as to the terms of the contract of sale the vendor sued the vendee for specific performance which was granted in the lower Court, but the High Court reversed the decree on the

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(1) I.L.R., 19 Calc., 123. (2) I.L.R., 26 Bom., 750.
(3) I.L.R., 11 All., 47.

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und that there had been no contract between the parties. The dee then sued to recover the purchase money paid by him as consideration had failed and their Lordships decided that the lure must be considered to have arisen when the High Court versed the decree of the lower Court. The facts of the present case are not precisely similar, but in their judgment their Lordships observed that it would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not. Where, as in the present case, a man has been dispossessed by suit, it would in our opinion be equally unreasonable to require him to sue for relief founded on such dispossession before the date of the final decree under which he was dispossessed. The dispossession in execution of the decree of the Court of First Instance was not final but subject to the result of an appeal, and the effect of filing the appeal was to reopen the question of his right to possession and make it once more *sub judice* pending the decision of the appeal. If the appellant had succeeded, his dispossession under the decree the Court of First Instance would have been disregarded for purposes of limitation and he would have been held to have been in possession throughout (*Narayanan Chetty* v. *Kannammai Achi*(1)).

Under these circumstances we think that the breach of consideration which constituted the plaintiff's cause of action under section 119 of the Transfer of Property Act cannot be considered to have arisen before the date of the final decree in the suit in which he was dispossessed, and consequently that the present suit is in time. We must therefore confirm the order of the Subordinate Judge, and dismiss the appeal with costs.

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(1) I.L.R., 28 Mad., 338.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1906. October 23, 24.

BALIJEPALLI SESHAYYA (FIRST DEFENDANT), APPELLANT,

v.

BALIJEPALLI SUBBAYYA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 13—*Collector's decision under s.* 13 *of Act III of* 1895 *not questionable in subsequent suit in Civil Courts.*

Under section 13 of Act III of 1895, the Collector has jurisdiction to determine whether lands are the emoluments of an office or not, and the parties to the proceeding are debarred by section 13 of the Civil Procedure Code and the general principles of *res judicata* from re-agitating the same question subsequently in a Civil Court.

THE facts necessary for this report are set out in the judgment.

The Hon. Sir *V. C. Desikachariar* for *T. Rungachariar* for appellant.

T. V. Seshagiri Ayyar for respondent.

JUDGMENT.—In this case the plaintiff seeks to recover lands which have been held to be emoluments of the defendant's office in a suit instituted by the present first defendant against the present plaintiffs under section 13 of Madras Act III of 1895 before the Collector.

It has recently been decided by the Full Bench in *Kesiram Narasimhulu* v. *Narasimhulu Patnaidu*(1), that a suit to recover lands as emoluments of a hereditary office is within the provisions of section 13 conferring jurisdiction upon the Collector and also within the provisions of section 21 ousting the jurisdiction of the Civil Courts, and that the proviso to section 21 only applies where the defendant pleads that no emoluments appertain to the office, which plea was not raised in the suit before the Collector mentioned above, and the proviso to section 13 only applies when one of the facts in issue is whether the emoluments of the office consist of land or of an assignment of land-revenue payable in respect of

* Civil Miscellaneous Appeal No. 171 of 1905, presented against the order of remand by M.R.Ry. T. Varada Row, Additional Subordinate Judge of Godavari at Rajahmundry, in Appeal Suit No. 558 of 1904, presented against the decree of M.R.Ry. P. V. Ramachandra Ayyar, District Munsif of Tanuku, in Original Suit No. 440 of 1903.

(1) I.L.R., 30 Mad., 126.

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BALIJEPALLI SESHAYYA v. BALIJEPALLI SUBBAYYA.

land, an issue which did not arise in the suit before the Collector mentioned above. The Collector was therefore competent under section 13 of Madras Act III of 1895 to try the issue whether the lands in question were emoluments of the defendant's office or not, and the Legislature has not made any provision for subsequently questioning his decision in a Civil Court in the circumstances of the present case. The parties are therefore debarred by the express provisions of section 13 of the Code of Civil Procedure, and the general principles of *res judicata* from reagitating the same question in this suit before a Civil Court, and it is not necessary to have recourse to the provisions of section 21, which it would only be necessary to look to if the question had not already been decided in a suit under section 13 of Madras Act III of 1895. The decision in *Ravutha Koundan* v. *Muthu Koundan*(1), proceeded on the ground that under Regulation VI of 1831 the Revenue Courts had no jurisdiction to entertain a suit to establish that certain lands were the emoluments of an office. This decision has been questioned in *Palamalai Padayachi* v. *Shanmuga Ausari*(2), but whether right or wrong, it cannot apply to a case where the Revenue Court had jurisdiction. We set aside the order of the lower Appellate Court, restore the decree of the District Munsif and direct the respondents to pay the appellant's costs in this and the lower Appellate Court.

(1) I.L.R., 13 Mad., 41. (2) I.L.R., 17 Mad., 302.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. January 10, 17.

TUROF SAHIB AND ANOTHER (DEFENDANTS NOS. 11 AND 17), APPELLANTS,

v.

ESUF SAHIB AND ANOTHER (PLAINTIFFS NOS. 1 AND 2), RESPONDENTS.*

Transfer of Property Act IV of 1882, ss. 105 and 107—Lease, within the meaning of, can only be effected by written instrument signed by the lessor.

A 'lease' as defined by section 105 of the Transfer of Property Act, is a transfer of property, and such a transfer can only be made by the person in whom the property to be transferred is vested.

The registered instrument by which a lease can be effected under section 107 of the Transfer of Property Act must be an instrument bearing the signature of the lessor.

Ambalavana Pandaram v. *Vaguran*, (I.L.R., 19 Mad., 52), distinguished.

Seshachela Naiker v. *Varadachariar*, (I.L.R., 25 Mad., 55), distinguished.

SUIT for a permanent injunction to restrain the defendants from interfering with the enjoyment of certain lands by the plaintiffs, as lessees, and for damages.

It was alleged that the plaintiffs obtained the lease in question by a registered muchilika executed by the plaintiffs in favour of the father of the first defendant. The alleged lease was for a period of three years and the annual rental was Rs. 2,000.

The first defendant and others contended *inter alia* that the registered muchilika being executed by the plaintiffs alone did not create a valid lease. The District Munsiff held that the execution of the muchilika alone by the tenant without a corresponding putta by the lessor was not sufficient to create the relation of lessor and lessee and dismissed the suit.

On appeal the District Court held that a contract of lease may be made by a document signed by the tenant alone, if it is shown that the contract was completed by acceptance by the lessor. The

* Civil Miscellaneous Appeal No. 68 of 1906, presented against the order of F. H. Hamnett, Esq., District Judge of South Arcot, in Appeal Suit No. 173 of 1905, presented against the decree of M.R.Ry. T. Rajaram Rau, District Munsif of Tirukkoyilur, in Original Suit No. 10 of 1904.

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dgment of the lower Court was reversed and the suit remanded r retrial.

Defendants Nos. 11 and 17 appealed to the High Court.

T. Rangachariar and *M. Narayanaswami Ayyar* for appellants.

T. V. Seshagiri Ayyar for respondents.

JUDGMENT.—In this case the plaintiffs sue for an injunction restraining the defendants from interfering with their enjoyment of certain villages which they claim under a lease exhibit G. Exhibit G is a registered muchilika or agreement by the plaintiffs to hold the villages on lease from the first defendant's father for a term of two years and the District Munsif dismissed the plaintiff's suit on the ground that Exhibit G was not a registered lease within the meaning of section 107 of the Transfer of Property Act as the lessor was no party to it. The District Judge reversed this judgment on the authority of *Ambalavana Pandaram* v. *Vaguran*(1) and *Seshachala Naicker* v. *Varadachariar*(2), but we think that these decisions that the signature of both parties is not necessary to make a contract in writing registered within the meaning of Article 116 of the Limitation Act, do not govern the present case. The question here is whether exhibit G can be considered to be a lease made by a registered instrument within the meaning of section 107 of the Transfer of Property Act. According to the definition in section 105 of the Transfer of Property Act a lease is a transfer and a lease made by registered instrument is therefore a transfer made by registered instrument. A transfer can only be made by the person in whom the property to be transferred is vested, that is to say, by the lessor. This applies equally to transfers by way of sale, mortgage, lease and gift. In the case of mortgages and gifts it is expressly provided by sections 59 and 123 that the registered instrument must be signed by the mortgagor or donor and attested by at least two witnesses, but it does not follow from this that transfers by way of sale or lease can be made by any one but the vendor or lessor respectively. Sales and leases by registered instrument necessarily bear the signatures of the vendor or lessor under section 58 of the Registration Act, and the special mention of the mortgagor's and donor's signatures is due to the fact that such signatures require attestation. Our present decision is in accordance with *Nand Lal* v. *Hanuman*

(1) I.L.R., 19 Mad., 52. (2) I.L.R., 25 Mad., 55.

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TUROF SAHIB v. ESUF SAHIB.

Das(1) and *Kashi Gir* v. *Jogendra Nath Ghose*(2), and *Beni* v. *Puran Das*(3) with which we agree, is not opposed to *Bewley* v. *Atkinson*(4) which has been relied on for the respondents. That was a case on the construction of section 3 of the Prescription Act 2 and 3 William IV, Chapter 71, Section 3 (1) which confers an absolute right to the use of light which has been enjoyed continuously for 20 years "unless it shall appear that the enjoyment was by some consent or agreement expressly made or given for that purpose by deed or writing." Under this section it was held that an agreement signed by the owner of the house and therefore the party against whom it was to operate agreeing to block up the windows in question when called on and to pay six pence annually in the meantime was a sufficient agreement in writing and did not require to be signed by the other party, as there was nothing in the section requiring that the agreement should be signed by both parties. The section now before us, as already pointed out, requires that the transfer shall be in writing and signed by the lessor. We must allow the appeal with costs in this and in the lower Appellate Court, and restore the decree of the District Munsif.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. February 1, 5.

SUBBANNA BHATTA AND ANOTHER (PETITIONERS, SONS OF JUDGMENT-DEBTORS), APPELLANTS,

v.

SUBBANNA (MINOR) BY MOTHER AND NEXT FRIEND GOPAMMA (COUNTER-PETITIONER, PLAINTIFF), RESPONDENT.*

Hindu Law—Maintenance, decree for—When such decree can be executed after death of person against whom it is passed against other members of joint family.

A decree for maintenance obtained against a member of an undivided family, can, after his death, be executed against joint property in the hands of other

(1) I.L.R., 26 All., 368.
(2) I.L.R., 27 All., 136.
(3) I.L.R., 27 All., 190.
(4) L.R., 13 Ch.D., 283.

* Civil Miscellaneous Second Appeal No. 46 of 1906, presented against the decree of H. O. D. Harding, Esq., District Judge of South Canara, in Appeal Suit No. 40 of 1906, presented against the order of M.R.Ry. A. Subrahmania Ayyar, District Munsif of Puttur, in Execution Application No. 60 of 1905.

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members, if the member against whom the decree was passed, was sued as representing the family, or, if the decree created a charge on the joint family property.

Muttia v. *Virammal*, (I.L.R., 10 Mad., 283), referred to.

THE respondent in this case obtained a decree for maintenance against the undivided father of appellants by which the family properties were made liable. Pending the appeal against the decree, the appellants' father died and the appellants were brought on record as representatives, and the appeal was dismissed.

On execution being taken out by the respondent, the appellants objected that the decree could not be executed as they had succeeded to the property by survivorship. The objection was disallowed by the Munsif and his order was confirmed on appeal.

Appellants appealed to the High Court.

K. P. Madhava Rao and *K. S. Ramasami Sastri* for appellants.

C. Ramachandra Rao Saheb and *B. Sitarama Rao* for respondent.

JUDGMENT.—In this case the respondent obtained a decree for maintenance as an illegitimate son in a suit against his natural father, and by the decree, such maintenance was charged on the joint family property of the father and his legitimate sons who are the present appellants. They were not parties to the suit originally, but were brought on as their father's representatives after his death, and presented an appeal from the judgment of the Court of First Instance which was dismissed. They now oppose the execution of the maintenance decree by sale of the property charged on the ground that they were not parties to the suit, except as the representatives of their father, that they are not bound by the decree, and that on the father's death the joint family property passed to them by survivorship free of the charge. We are of opinion that the lower Courts were right in refusing to give effect to these contentions. In *Muttia* v. *Virammal*(1) it was held that a decree for maintenance obtained by a widow in a suit against her husband's brothers could not be executed after his death against joint family property in the hands of other members of the family. But it was expressly observed that the decision would have been the other way if the defendant had been

(1) I.L.R., 10 Mad., 283.

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SUBBANNA BHATTA v. SUBBANNA.

sued as representing the family or if the maintenance had been charged on the joint family property, which was the case here. This ruling was followed in *Minakshi Achi* v. *Chinnappa Udayan*(1). That was a suit by a widow for maintenance against the three undivided brothers of her husband without joining the minor son of one brother, and the decree charged the maintenance on the joint family property. It was held that the decree could be executed against the joint family property in the hands of the minor who was not a party, as the decree was against the representatives of the family and directly created a charge. It is argued for the appellants that in the present case the decree was not obtained against the father as representing the joint family; but, according to the ruling in *Muttia* v. *Virammal*(2), it is sufficient if by the decree the maintenance is charged on the joint family property which is the case here. Further, where as here, the managing member is sued for the purpose of charging the joint family property, we think he must be considered to be sued as a representative of the joint family even if it is not so expressly stated in the plaint.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar.

1907. February 6.

MANAVALA GOUNDAN, PETITIONER,

v.

KUMARAPPA REDDY, RESPONDENT.*

Civil Procedure Code, Act XIV of 1882, *s.* 622—*District Registrar, not a 'Court' within the meaning of.*

A District Registar is not a Court within the meaning of section 622 of the Code of Civil Procedure, and the High Court cannot interfere with his proceedings under that section.

Atchayya v. *Gangayya*, (I.L.R., 15 Mad., 138), distinguished.

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(1) I.L.R., 24 Mad., 689. (2) I.L.R., 10 Mad., 283.

* Civil Revision Petition No. 403 of 1905, presented under section 622 of the Code of Civil Procedure praying the High Court to revise the judgment of M.R.Ry. A. Periyasami Mudaliar, District Registrar of Madras, Chingleput, awarding costs in Appeal Suit No. 13 of 1905, presented under section 73 of the Registration Act.

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MANAVALA GOUNDAN v. KUMARAPPA REDDY.

THE facts of the case are fully set out in the judgment.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for petitioner.

K. S. Ramaswami Sastri for respondent.

JUDGMENT.—Mr. Ramasami Sastri has taken a preliminary objection that it is not competent to this Court to revise an order of the District Registrar under section 622, Code of Civil Procedure. The objection must prevail. The word 'Court' in the section should be understood in its ordinary legal sense 'a place where justice is judicially ministered' (STROUD).

There is nothing in the Civil Procedure Code which would indicate that the term is used in the section in any special or enlarged sense.

It is impossible to hold that the District Registrar is a Court within the meaning of the section. My attention has been drawn on behalf of the petitioner to *Atchayya* v. *Gangayya*(1). The Court was not there considering the question whether the Registering officer was a Court within the meaning of section 622, Code of Civil Procedure. Whether the reasoning adopted by the learned Judges there should be preferred to the reasoning adopted by the other Courts with reference to the question whether a Registrar was a Court within the meaning of section 195 of the old Criminal Procedure Code, is not a matter for me to enter into. Assuming that the functions which the Registrar exercises in a case such as was before him in the present instance were altogether judicial, that would not warrant the conclusion that his decision was that of a Court.

Upholding the preliminary objection, I dismiss the petition with costs.

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(1) I.L.R., 15 Mad., 138.

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APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. January 22, 23.

KASI VISWANATHAN, APPELLANT,

v.

EMPEROR.*

Criminal Procedure Code—Act V of 1898, ss. 222, 233, 234 and 235—Three distinct offences of criminal breach of trust and three distinct offences of falsifying accounts cannot be tried together.

It is illegal to try a person on a charge which alleges three distinct acts of criminal breach of trust and three distinct acts of falsifying accounts.

Section 234 of the Code of Criminal Procedure will not apply, as the offences of criminal breach of trust and falsification of accounts are not of the same kind; neither will section 235 cover the case, as the several offences cannot be said to form part of the same transaction.

King-Emperor v. *Nathlal Bapuji*, (4 Bom. L.R., 433), referred to.

Although, under section 222 of the Code of Criminal Procedure, a charge for the gross amount misappropriated within a period of twelve months shall be deemed to be a charge of one offence within section 234, it does not follow that the acts so charged should be considered to be one transaction within the meaning of section 235.

THE accused in this case was tried and convicted by the Sessions Court of Guntúr on a charge which alleged three distinct offences of criminal breach of trust under section 409 of the Indian Penal Code and three distinct offences of falsification of accounts under section 477-A of the Indian Penal Code.

The accused appealed to the High Court.

Dr. *S. Swaminadhan* and *T. V. Narayaniah* for appellant.

The Public Prosecutor in support of the conviction.

JUDGMENT.—The accused has been tried and convicted on a charge which alleged three distinct acts of criminal breach of trust, which are offences under section 409 of the Indian Penal Code, and three distinct acts of falsification of accounts which are offences under section 477-A of the Indian Penal Code, that is, six distinct offences in all. This procedure is opposed to section 233 of the Criminal Procedure Code, and is not covered by any of the

* Criminal Appeal No. 714 of 1906, presented against the conviction and sentence of T. M. Rangachariar, Esq., Sessions Judge of Guntúr Division, in Sessions Case No. 34 of 1906.

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KASI VISWANATHAN v. EMPEROR.

exceptions provided in the subsequent sections of the Code. Section 234 of the Criminal Procedure Code does not cover the case because the offences of falsification of accounts are not of the same kind as the offences of criminal breach of trust, and section 235 does not cover it because the falsification of accounts connected with one act of criminal breach of trust cannot be said to form part of the same transaction with the other criminal breaches of trust. Each act of criminal breach of trust may, no doubt, be said to form part of the same transaction with the falsification of accounts made with a view to conceal that act of breach of trust; but it does not form part of the same transaction with the other breaches of trust and falsifications which were committed on altogether different occasions. There is no provision of the code which says that all offences committed within one year in the course of three separate transactions may be tried at one trial. The same view has been expressed in the cases of *King-Emperor* v. *Nathlal Bapuji*(1) and *Bhagavati Dial* v. *King-Emperor*(2).

The learned Public Prosecutor, however, further argues that under section 222 of the Criminal Procedure Code, as now amended, the three acts of criminal breach of trust may be regarded as one offence, and that all the acts of falsification of the accounts to conceal that offence may also be regarded as part of the same transaction within the meaning of section 235 of the Criminal Procedure Code, and he relies on the recent case of *Emperor* v. *Datto Hanmant Shahapurkar*(3).

It is true that section 222 provides for a charge being framed in respect of the gross sum misappropriated within twelve months from first to last and enacts that a charge so framed shall be deemed to be a charge of one offence within the meaning of section 234, but it does not provide that the acts so charged shall be deemed to be one transaction within the meaning of section 235.

In the present case the charge of criminal breach of trust has not been drawn under section 222, but alleges three distinct offences under section 409, Indian Penal Code, and three other distinct offences under section 477-A, Indian Penal Code, and we

(1) 4 Bom. L.R. 433.
(2) (1905) Punjab Criminal Records; Criminal Case No. 2, page 4.
(3) I.L.R., 30 Bom., 49 at page 53.

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do not think that there is anything in the code to justify such a charge. The error is not a mere irregularity, but is an illegality which wholly vitiates the trial—*vide Subramania Ayyar* v. *King-Emperor*(1).

We set aside the conviction and order a new trial on a charge framed in accordance with law. Probably it would be most convenient to charge the three acts of criminal breach of trust only. The falsification of accounts might be proved as part of the evidence in proof of the criminal breach of trust, but they should not be charged as offences.

APPELLATE CRIMINAL.

Before Mr. Justice Subrahmania Ayyar.

1907. March 7.

PRATHIPATI VENKATASAMI AND OTHERS,

v.

EMPEROR.*

Criminal Procedure Code, Act V of 1898, *ss.* 107, 112, 117—*Order for security not to be made without recording legal evidence.*

An order requiring a person to furnish security has the effect of a conviction, as the person so required is liable to imprisonment if he fails to comply with the order. Such an order ought not to be passed without formal evidence being recorded.

Reg v. *Jinji Limji*, (6 B.H.C.R.Cr.C. 1), referred to.

Reg. v. *Talpatram Pemabhai*, (5 B.H.C.R.Cr.C. 105), referred to.

THE Stationary Sub-Magistrate of Bapatla submitted a report to the Joint Magistrate of Ongole to the effect that accused were likely to commit a breach of the peace and directed them to appear before the Joint Magistrate. The report purported to be submitted with a view to action being taken to preserve the peace under section 107 of the Code of Criminal Procedure.

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(1) I.L.R., 25 Mad., 61.

* Criminal Rivision Case Nos. 34 and 74 of 1907, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of J. T. Gillespie, Esq., Jonit Magistrate of Ongole, dated 21st December 1906, in Small Cause No. 12 of 1906.

Case Referred No. 7 of 1907 for the orders of the High Court under section 438 of the Code of Criminal Procedure by M.R.Ry. Y. Janakiramayya Sastri, Sessions Judge of Guntúr in his letter, dated 12th February 1907, Dis. No. 545.

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On the accused appearing before the Joint Magistrate, he, at once, passed a preliminary order under section 112, ordering the accused to show cause why they should not be bound over to keep the peace. Later on, in the same day, the Joint Magistrate, after hearing the arguments of the vakils, but without making any inquiry or recording any evidence, made a final order under section 118, requiring the accused to furnish security for keeping the peace.

The Sessions Judge, being of opinion that the order made without recording any evidence, was illegal, referred the matter to the High Court.

Mr. *E. R. Osborne* and *K. Kuppuswami Ayyar* for petitioners.

The Public Prosecutor for the Crown.

ORDER.—In this case though notice was issued calling upon the petitioners to give security as required by law, yet when the case came on for hearing, the Magistrate proceeded to make the final order without recording any evidence whatever. He refers to the vakil who appeared for the petitioners admitting the fact as stated. It is difficult for me to suppose that the vakil admitted that his clients were going to commit a breach of the peace. In all probability the vakil contended that in the circumstances in which his clients were placed, they were entitled to retain possession without interference on the part of the other party, and that they should not be called upon to give security. Be this as it may, the Magistrate, in fact, proceeded to treat the statement by the vakil as an admission of an intention to commit a breach of the peace, and passed the order calling upon them to furnish security. This procedure I consider wrong (*Reg. V. Jivanji Limji*(1) and *Reg* v. *Dalpatram Pemabhai*(2)).

If a person is required to furnish security and fails to do so, he is liable to be imprisoned for a period not exceeding a year. In proceedings such as this, no final action shold be taken, and no order having the effect of a conviction as against the accused should be passed, without formal evidence being recorded. On this ground I set aside the order.

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(1) 6 B.H.C.R.Cr.C. 1. (2) 5 B.H.C.R.Cr.C. 105.

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APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. February 14.

PATALA ATCHAMMA (PETITIONER IN MAINTENANCE CASE NO. 4 OF 1906 ON THE FILE OF THE HEAD-ASSISTANT MAGISTRATE OF NARASAPATAM),

v.

PATALA MAHALAKSHMI OF ARABUPALEM (COUNTER-PETITIONER).*

Criminal Procedure Code, Act V of 1898, ss 488, cl. 4—'Living in adultery', refer to course of conduct.

A single act of adultery does not necessarily amount to "Living" in adultery within the meaning of section 488, clause 4 of the Code of Criminal Procedure, and will not justify a Magistrate in refusing maintenance. "Living" in adultry, refers to a course of conduct and means something more than a single lapse from virtue.

Kallu v. *Kaunsilia*, (I.L.R., 26 All., 326), followed.

THE facts are fully stated in the order of reference which is as follows:—

"I have the honour to submit herewith under section 488 of the Criminal Procedure Code for the orders of the Honourable Judges of the High Court the records in Maintenance Case No. 4 of 1906 on the file or the Head Assistant Magistrate, Narasapatam Division (Criminal Revision Case No. 21 of 1906 on the file of this Court).

There is some evidence—by no means very consistent evidence, and much of it very indefinite—that her husband sent away the petitioner (wife) and refused either to live with her or maintain her any longer because she was caught in the house of one Ramasami (D.W. 1) along with one Kottapilli Yellapa (D.W. 3) to which they had gone for sexual intercourse. The boy Ramasami (D.W. 1) denied all knowledge of this matter and Yellappa (D.W. 3) denied the truth of the story. However, believing this evidence, the Head Assistant Magistrate has held that the wife

* Case referred No. 114 of 1906 (Criminal Revision Case No. 519 of 1906) for the orders of the High Court under section 488 of the Code of Criminal Procedure by Vernor A. Brodie, Esq., Sessions Judge of Vizagapatam, in his letter, dated 13th November 1906, No. 2898.

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PATALA ATCHAMMA v. PATALA MAHALAKSHMI.

petitioner committed adultery upon that occasion and accordingly dismissed her application for maintenance as he was of opinion that the husband was justified in refusing to maintain her.

The correctness of the lower Court's finding of misconduct on the part of the petitioner has been disputed before me and I must say that the evidence on which it is based does not appear to me to be satisfactory, for it is admitted that Yellappa was not caught when the petitioner is said to have been and there is no evidence that the petitioner has been outcasted which is the usual penalty for such misconduct. On the contrary she is said to be living with her parents in caste.

It is not however because of the insufficiency or indifferent quality of the evidence against the petitioner that I make this reference, but upon the ground that section 488 (4) of the Criminal Procedure Code only appears to disentitle a wife to maintenance who is living in adultery and this was not even alleged. The caste of the parties does not, it is said, permit of divorce or re-marriage and though a single act of misconduct will morally justify a husband in separating from his wife, it does not appear to release him from the obligation of maintaining her. This has been held in *Kallu* v. *Kaunsilia*(1) in which various other cases are quoted and this decision appears to me to be in strict conformity with the letter of section 488 of the Criminal Procedure Code.

Under these circumstances, I am of opinion that the order of the Head Assistant Magistrate is wrong, and that the case should be sent back to the Head Assistant Magistrate with directions to fix the amount of maintenance payable should he find, on inquiry, that the wife is not now living in adultery or has not since misconducted herself.

The explanation of the Head Assistant Magistrate is also forwarded. The Bombay case to which he refers does not appear to me to have any application as it refers to misconduct by a wife whilst receiving maintenance, nor has the English case quoted any direct bearing for here we are governed by the words of a Statute and not by case law."

The Public Prosecutor in support of the reference.

P. Nagabhushanam for counter-petitioner.

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(1) I.L.R., 26 All., 326.

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PATALA ATCHAMMA v. PATALA MAHALAKSHMI.

JUDGMENT.—The petitioner applied for an order for maintenance against her husband under section 488, Criminal Procedure Code.

The husband alleged and the Magistrate found that the wife was put away because of one act of adultery some ten months previously, and the Magistrate therefore dismissed the petition on the ground that, under clause 4 of the section, the wife was disentitled to maintenance. Clause 4 enacts that " no wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery."

We do not think that a single act of adultery necessarily amounts to " living in adultery." These words refer rather to a course of conduct, or at least to something more than a single lapse from virtue. This is the view that has been consistently followed by the Allahabad High Court (vide *Kallu* v. *Kaunsilia*(1)) and is in accordance with the natural meaning of the words and the interpretation placed on them in Criminal Revision Cases Nos. 472 and 505 of 1896 by this Court. Shepherd, J., there says that the words living in adultery " point to a continuous course of conduct not to isolated acts of immorality." And Benson, J., says the words " imply a course of action more or less continuous" (*Gantapalli Appalamma* v. *Gantapalli Yellayya*(2)).

We therefore set aside the order of the Head Assistant Magistrate and direct him to restore the petition to his file and dispose of it according to law.

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(1) I.L.R., 26 All., 326. (2) I.L.R., 20 Mad., 470

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APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Subrahmania Ayyar, Mr. Justice Benson and Mr. Justice Miller.

KRISHNASAMI NAIDU (PLAINTIFF), APPELLANT,

v.

SOMASUNDARAM CHETTIAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

1906.
October 31.
December 20.
1907.
January 31.

Jurisdiction—Valuation of suit—Suit by unsuccessful claimant under s. 283 of the Code of Civil Procedure to obtain the declaration rendered necessary by the order allowing attachment, when there is no distinct claim against judgment-debtor for declaration of title, to be valued at the amount for which attachment is made and not at the value of the property—Judgment-debtor not party, merely as such, to claim proceedings in the eye of law.

A claim to attached property under section 278 of the Code of Civil Procedure being dismissed, the unsuccessful claimant sued for a declaration that the property was not liable to attachment as the property of the judgment-debtor.

The judgment-debtor was made a party but no distinct claim was made against him. The value of the attached property was Rs. 2,775, while the amount for which attachment took place was only Rs. 1,700:

Held, that such a suit was not a suit to obtain a declaration of title to the property, but one for getting rid of the effect of the order disallowing the claim, and ought to be valued at the amount for which the property was attached when such amount is less than the value of the property.

Dwarka Das v. *Kameshar Prasad*, (I.L.R., 17 All., 69), distinguished.

A judgment-debtor who is not in fact a party to the claim proceedings does not in the eye of law become such by reason solely of his being the judgment-debtor.

Moidin Kutti v. *Kunhi Kutti Ali*, (I.L.R., 25 Mad., 721), followed.

THE facts of the case are sufficiently set out by (Benson and Wallis, JJ.) in the Order of Reference to the Full Bench which was as follows:—

ORDER OF REFERENCE TO A FULL BENCH.—In this case the plaintiff who made an unsuccessful claim, under section 278 of the Code of Civil Procedure, to property attached in execution of a decree, brings a suit against the decree-holders and the judgment-debtor for a declaration that the property is not liable to be attached as the property of the judgment-debtor. The amount of

* Civil Miscellaneous Appeal No. 75 of 1905, presented against the order of J. Hewetson, Esq., District Judge of Trichinopoly, dated the 6th December 1904, in Original Suit No. 28 of 1904.

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KRISHNASAMI NAIDU v. SOMA-SUNDARAM CHETTIAR.

the decree-debt is Rs. 1,700, and within the jurisdiction of the District Munsif, but the value of the attached property is over Rs. 2,500 and so beyond his jurisdiction; and the question is which of these figures is to be taken as the amount or value of the subject matter of the suit within the meaning of section 12 of the Madras Civil Courts Act, 1873.

The District Judge has held that the suit should have been brought in the Court of the District Munsif, on the ground that this is a suit to set aside an attachment of land within the meaning of section 7, paragraph viii, of the Court Fees Act, 1870, that the Court-fee payable in respect of such suit depends on the amount for which such land was attached, and that under section 8 of the Suits Valuation Act, 1887, the same amount must be regarded in determining the subject-matter of the suit for purposes of jurisdiction. For the appellant it was argued that this was not a suit to set aside an attachment of land, and the decision of this Court in *Narainan* v. *Nilakandan Nambudri*(1) to this effect was relied on. The question in that suit was whether the plaintiff was entitled to ask for a declaration that the property was not liable to attachment and was not bound to ask for consequential relief as well, as by setting aside the attachment. It is however authority for the proposition that a suit under section 283, Civil Procedure Code, is not strictly speaking a suit to set aside an attachment of land, and if so section 7, paragraph viii, of the Court Fees Act does not apply.

The other side relied on *Krishnama Chariar* v. *Srinivasa Ayyangar*(2) and *Modhusudun Koer* v. *Rakhal Chunder Roy*(3), but these were cases in which the decree-holder sued under section 283 to establish his right to attach and were clearly not suits to set aside an attachment of land within the meaning of section 7, paragraph viii, of the Court Fees Act. In such cases it has been held that the subject-matter of the suit is the right to attach the property for the decree-debt, and that the amount of the decree-debt must be looked to unless it exceeds in value the property sought to be attached, in which case the value of the property must be looked to.

In *Dwarka Das* v. *Kameshar Prasad*(4), it was held with regard to the provisions of the local enactment corresponding to section

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(1) I.L.R., 4 Mad., 131.
(2) I.L.R., 4 Mad., 339.
(3) I.L.R., 15 Calc., 104.
(4) I.L.R., 17 All., 69.

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KRISHNASAMI NAIDU v. SOMASUNDARAM CHETTIAR.

12 of the Madras Civil Courts Act, 1873, the language of which for the present purposes may be considered identical, that where in a suit by the claimant against the decree-holder and the judgment-debtor the plaintiff prayed for a declaration that the property was his and was not liable to attachment, the attached property must be taken as the subject-matter of the suit; and the decision has been approved in *Dhan Devi* v. *Zamurrad Begam*(1). The only thing that distinguishes that case from the present is that there the plaintiff asked for a declaration of his title to the property, as well as a declaration that it was not attachable, while here he asks simply for a declaration that it is not attachable as the property of the judgment-debtor.

It has recently been held in *Morshia Barayal* v. *Elahi Bux Khan*(2) that a suit by an unsuccessful claimant under section 283 is only a suit to have it declared that the property is not liable to attachment and is not a suit to establish his title to the property and the same view appears to have been taken in *Kristnam Sooraya* v. *Pathma Bee*(3). If this be so, it would seem to follow that the amount of the debt for which the property is attached should primarily determine the jurisdiction as held in *Krishnama Chariar* v. *Srinivasa Ayyangar*(4) and *Modhusudun Koer* v. *Rakhal Chunder Roy*(5) and earlier cases with regard to suits by the decree-holder. The right to attach would, of course, depend on the question of title to the property as between the plaintiff and the judgment-debtor, and the decision would, apparently, be *res judicata* as to the title between these parties, if the suit were tried before a Court of competent jurisdiction, having regard to the value of the property, otherwise not; but the suit itself would relate to the right to attach and not to the title. There is, however, a recent decision of this Court in *Kayyana Chittemma* v. *Doosy Gavaramma*(6) which appears to be opposed to the view that a suit by an unsuccessful claimant under section 283 is only concerned with the right to attach. It was there held that when an order has been made against a claimant under section 283, and he fails to sue within a year, the order is conclusive as between the claimant and the judgment-debtor not only as regards the liability of the property to attachment, but also as to the claimant's title to the property,

(1) I.L.R., 27 All., 440.
(2) 3 C.L.J., 381.
(3) I.L.R., 29 Mad., 151.
(4) I.L.R., 4 Mad., 339.
(5) I.L.R., 15 Calc., 104.
(6) 16 M.L.J., 136.

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and that a claimant who had failed to sue within a year is ba from asserting his title to the property as against the judgm debtor and those claiming under him, although the attachmen the decree-holder had been raised and the property not brought sale under it. It would appear to follow from this decision th the claimant's title to the property must be considered as the subject-matter of the suit in a case like the present and that therefore the suit was within the jurisdiction of the District Judge.

In this apparent conflict of authority we have resolved to refer to a Full Bench the following question:—

"Is the present suit within the District Munsif's jurisdiction?"

The case came on for hearing in due course before the Full Bench constituted as above:—

K. Bhashyam Ayyangar for the Hon. Sir *V. C. Desikachariar* for appellant.

K. Srinivasa Ayyangar for first and second respondents.

The Court expressed the following

OPINION.—Under the plaint as framed in this case the suit is one for getting rid of the effect of the order disallowing the claim of the plaintiff to the property when it was attached in execution of the money decree which had been obtained by the defendants Nos. 1 and 2 against the third defendant. The amount for which the attachment took place was Rs. 1,700, while the value of the property attached was Rs. 2,775. Though the judgment-debtor was impleaded as the third defendant, the plaint contains no statement of any cause of action as against him for a declaration as to the plaintiff's title to the property. The suit must therefore be held to be one for a declaration of the plaintiff's right rendered necessary by the order passed against him allowing the attachment at the instance of defendants Nos. 1 and 2.

In this view the present case is distinguishable from that of *Dwarka Das* v. *Kameshar Prasad*(1) in which the Court proceeded on the footing that there was a distinct claim against the judgment-debtor for a declaration of title to the property in addition to the declaration claimed as against the attaching creditor. It follows, therefore, that the valuation of the subject-matter of the suit should, on principle, be taken to be the amount for which the attachment

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(1) I.L.R., 17 All., 69.

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was made, viz., Rs. 1,700, that amount being less than the value of the property.

KRISHNASAMI NAIDU v. SOMASUNDARAM CHETTIAR.

It was, however, urged on behalf of the plaintiff that, in a case like the present, the order passed on the claim was one to which the judgment-debtor (the third defendant) was a party, and therefore, as between him and the plaintiff, the title to the whole property was in dispute and the value of the property, therefore, should be taken to be the value of the subject-matter of the suit. In the plaint there is no allegation that the third defendant was, in fact, a party to the claim proceedings, nor can we agree with the contention that he, as judgment-debtor, was, in point of law, a party to it. *Moidin Kutti* v. *Kunhi Kutti Ali*(1) is a recent and direct decision against this contention. As to the case of *Kayyana Chittemma* v. *Doosy Gavaramma*(2), we think that the learned Judges proceeded on the assumption that the judgment-debtor was, in point of fact, a party. If it was intended to lay down a rule that a judgment-debtor in such cases is necessarily a party to the order, even though in point of fact he was not a party, we cannot agree for reasons which are sufficiently stated in the case already referred to *Moidin Kutti* v. *Kunhi Kutti Ali*(1).

We, therefore, answer the question referred to us in the affirmative, and hold that the suit was within the jurisdiction of the District Munsif.

The case came on for final hearing before (Benson and Wallis, JJ.) when the Court delivered the following

JUDGMENT.—In accordance with the opinion of the Full Bench we dismiss the appeal with costs.

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(1) I.L.R., 25 Mad., 721 at p. 723. (2) 16 M.L.J., 165.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1907.
March 18, 19.
April 23.

PARTHASARATHY PILLAI AND ANOTHER (DEFENDANTS Nos. 2 AND 4), APPELLANTS,

v.

THIRUVENGADA PILLAI AND OTHERS (PLAINTIFF AND DEFENDANTS Nos. 1 TO 5), RESPONDENTS.*

Hindu Law, wills—Charitable bequest—Bequest to 'Dharm' void.

One *G* by his last will and testament bequeathed certain properties to his daughter in the following words:—

"They (the executors) shall deliver all other properties to her on her attaining proper age (*i.e.*,) 18 years: my daughter shall use and enjoy the properties for her life. These properties shall, after her, be taken by her issue. In case my daughter may not perchance have any such issue, she should dispose of as she pleases all the properties she may have. *In case she, perchance, being short lived die before so attaining her age, the executors shall utilise those properties for Dharmam.*" The daughter died issueless before attaining majority. The plaintiff one of the executors and the next heir of the deceased *G* brought this suit for declaring the bequest to 'Dharma' void and to declare the right of plaintiff to succeed to the properties bequeathed to the daughter. Mr. Justice Boddam held the bequest to 'Dharmam' void and decreed the plaintiff's claim. On appeal, *held:*

Per CHIEF JUSTICE.—The bequest to 'Dharmam' is void. *Runchordas Vandrawandas* v. *Parvatibhai* (L.R., 26 I.A., 71), followed.

Per SUBRAHMANIA AYYAR, J.—The word 'Dharmam' when used in connection with gifts of property by a Hindu has a perfectly well-settled meaning and connotes *ishta* and poorta donations. The word is a compendious term referring to certain classes of pious gifts, and is not a mere vague and uncertain expression.

The testator must be presumed to have used the word with reference to the definite objects inculcated by shastraic precepts and well known to the people, and therefore the gift to 'Dharmam' is not void for indefiniteness.

SUIT by plaintiff for construing the will of the deceased *G*, for declaring the invalidity of certain provisions of the will and for declaring the rights of the plaintiff to the plaint properties as the next heir of *G*.

The sole question involved in the appeal is the validity of a certain clause in the will which is set out in the judgment of Mr. Justice Subrahmania Ayyar. The learned Judge who tried the suit held that the clause was invalid and passed a decree in favour of the plaintiff.

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* Original Side Appeal No. 44 of 1906, presented against the judgment and decree of Mr. Justice Boddam, dated 12th April 1906, in Original Suit No. 47 of 1905.

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The third and fourth defendants appealed.

Mr. *M. A. Tirunarayanachariar* for appellant.

The Ag. Advocate-General (Sir *V. Bhashyam Ayyangar*), the Hon. Mr. *P. S. Sivaswami Ayyar* and *P. Duraisawmy Ayyangar* for first respondent.

C. P. Ramaswamy Ayyar for third respondent.

JUDGMENT—Sir ARNOLD WHITE, C.J.—I am of opinion that the question raised in this appeal is covered by authority which is binding upon us. I do not think it can be suggested that, for the purpose of the point in question, the present case is distinguishable from *Runchordas Vandrawandas* v. *Parvatibhai*(1), decided by the Privy Council in 1899, and, in my opinion, the absence of any course of decisions in this Presidency would not warrant us in placing a different construction on the word 'Dharma' from that adopted by the Privy Council in the case referred to.

If the question had been *res integra* I should have been disposed to adopt the view taken by my learned brother in the judgment he is about to deliver—largely on the ground that he enjoys an advantage which I do not possess in being able to investigate the question by the light of original authorities without the medium of translations, and that in a question such as this he is specially qualified to pronounce an opinion.

I would dismiss the appeal.

SUBRAHMANIA AYYAR, J.—I took time to consider as, so far as I am aware, this is the first occasion the question of the validity of a bequest in the terms contained in the will here has come up for decision in this Court. The will is written in the Tamil language and the passage embodying the bequest in question runs thus:—

அப்படி ஒருகால் அதற்கு வயது வருவதற்குமுன் அற்பாயிஸாயிருந்து காலம் நேரிடுமேயாகில் அந்த சொத்துகளை எக்ஸிகியூட்டர்கள் தருமவிநியோகம் செய்யவேண்டியது.

of which the translation is—

"In case she perchance being short lived die before so attaining her age, the executors shall utilise those properties for "*darumum*."

The word *darumum* in the clause is a Tamil adaptation of the Sanskrit word dharma. Though the Sanskrit term and the adaptations thereof in the vernaculars of India possess various

(1) L.R., 26 I.A., 71.

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PARTHA-SARATHY PILLAI v. THIRU-VENGADA PILLAI.

significations, there can be no doubt thati n connection with gifts of property the word has a perfectly well-settled meaning. In that context the word denotes objects indicated by the terms *ishta* and *poorta*, the texts and commentaries connected with which form, as ably explained by Mandlik and Saraswati, the foundation of the Hindu Law of Endowments. (See Mandlik's 'Vyavahara Mayukha,' pp. 333 *et seq.* and Saraswati's 'Law of Hindu Religious Endowments,' Tagore Law Lectures for 1892, pp. 18 *et seq.*). As observed by these scholars, the terms *ishta* and *poorta* occur not only in the Smritis but even in the Rig Veda, and have formed the subject of elucidation by commentators including the most cele-brated. *Ishta* gifts refer to gifts at the altar in connection with sacrificial ceremonies prescribed by Hindu Sacred books, and *poorta* gifts refer to gifts for other purposes mentioned and extolled therein. In his work on Endowments, Saraswati cites a number of passages dealing with *ishta* and *poorta* and summarises the result in Lecture I. Under the latter head and learned writer enumerates construction of works for the storage of water, tanks, wells, &c., construction of temples, gift of food, relief of the sick, gifts for promoting knowledge, the bestowal of learning, of cows, and of lands, the last three being described as *atidana* or gifts *par excellence*. In support of the statement made above that the word *dharma* when it occurs in connection with gifts of property connotes *ishta* and *poorta* donations, two verses of Manu and some of the comments on one of them by the two great commentators Medhatithi and Kullooka as well as by Raghavananda may be cited. The verses are Nos. 226 and 227, Chapter IV. Dr. Bühler translates them thus —

* "Let him, without tiring, always offer sacrifices (*ishta*) and perform works of charity (*poorta*) with faith; for offerings and charitable works made with faith and with lawfully earned money, (procure) endless rewards.

Let him always practise, according to his ability, with a cheerful heart, the duty of liberality (*danadharma*), both by sacrifices

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* श्रद्धयेष्टं च पूर्तं च नित्यं कुर्यादतन्द्रितः ।
श्रद्धाकृते ह्यक्षये ते भवतः स्वागतैर्धनैः ॥
दानधर्मं निषेवेत नित्यमैष्टिकपौर्तिकम् ।
परितुष्टेन भावेन पात्रमासाद्य शक्तितः ॥
(Mandlik's 'Manava Dharma Shastra,' Vol. I, pp. 567 and 568.)

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(*ishta*) and by charitable works *poorta*, if he finds a worthy recipient (for his gifts)." 'Sacred Books of the East,' Volume XXV, p. 164.

Medhatithi thus comments upon the second verse:—

* "Danadharma (*i.e.*), tanks, &c.; (the expression is a) conjunctive compound; or that *dharma* which is *dana*.

By the introduction of the word *dharma* is implied absence of affection and presence of sense of duty." The commentator concludes with the observation that "the attitude of mind just referred to should exist in regard to both the classes of gifts, viz., *ishta* and *poorta*."

Kullooka's comments on the same verse are:—

† The *dharma* spoken of as *dana* relating to *ishta* and *poorta*, *i.e.*, at the altar (Vedi) and outside it, should, with cheerful heart and according to ability, be always performed having found a Brahman possessing learning and austerity.

Raghavananda observes:—

‡ Dana is distribution, according to means of wealth among those in need; *dharma* in that form, *i.e.*, of *dana*.

Verse 219, Ch. IX of Manu may also be referred to. In it among properties not liable to partition are included what in that text are called *yoga-kshema*. The author of the Mitakshara commenting thereon writes:

§ "The term *Yoga-Kshema* is a conjunctive compound resolvable into *Yoga* and *Kshema*. By the word *Yoga* is signified

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* दानधर्मश्च तडागादिः । समाहारद्वन्द्वः । अथवा दानं च तद्धर्मश्चा-सामिति । धर्मग्रहणेन प्रीत्या विना नियमभावमाह ॥ (Mandlik's Manava Dharma Sastra, Vol. I, p. 568).

† दानाख्यं धर्ममैष्टिकं पौर्तिकमन्तर्वेदिकं बहिर्वेदिकं च सर्वदा विद्यातपोयुक्तं ब्राह्मणमासाद्य परितोषाख्येनान्तःकरणयुक्तं यथाशक्तिकुर्यात् ॥ (*ibid*).

‡ दानं यथाशक्ति अर्थिभ्यो द्रव्यविभागः । तद्रूपं धर्मम् । (*ibid*).

§ योगश्च क्षेमश्च योगक्षेमम् । योगशब्देनालब्धकारणं श्रौतस्मार्ताग्नि-साध्यमिष्टं कर्म लक्ष्यते । क्षेमशब्देन लब्धपरिरक्षणहेतुभूतं बहिर्वेदिदान-तटाकारामनिर्माणादि पूर्तं कर्म लक्ष्यते । तदुभयं पैतृकमपि पितृद्रव्यविरो-धार्जितमप्यविभाज्यम् । यथाह लौगाक्षिः । क्षेमं पूर्तं योगमिष्टमित्याहु-स्तत्त्वदर्शिनः ॥

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a cause of obtaining something not already obtained (*ishta*): that is, a sacrificial act to be performed with fire consecrated according to the *Veda* and the law. By the term *Kshema* is denoted an auspicious act which becomes the means of conservation of what has been obtained, such as the making of a pool or a garden, or the giving of alms elsewhere than at the altar (*poorta*). Both these, though appertaining to the father, or though accomplished at the charge of the patrimony, are indivisible: as Laugakshi declares 'The learned have declared a (*poorta*) conservatory act *Kshema* and a (*ishta*) sacrificial one *Yoga*; both are pronounced indivisible).' " (Mit. Inheritance, Ch. I., Section IV, § 23.)

Referring to some diversity of opinion among commentators as to the meaning of the terms *yoga* and *kshema* in the above verse of Manu, Dr. Bühler supports the interpretation in the Mitakshara in the following significant passage: "My translation of *yogakshemam*, which I take with Medhatithi, Narayana and Nanda as a copulative compound in the neuter gender, by 'property destined for pious uses and sacrifices' rests on the explanation given by Vijnaneswara and adopted by Haradatta and Nandapandita on the parallel passages of Gautama and Vishnu. I prefer it to all others, chiefly on account of the explicit passage of Laugakshi which Vijnaneswara quotes. In its favour speaks also that numerous royal grants allow villages or land to Brahmanas and their descendants for the performance of certain sacrifices, or for charitable purposes, such as the daily distribution of food (annasattra or sadavrata) and that the occurrence of a rule in the Smritis, declaring property given under such conditions to be impartible, is no more than might be expected." ('Sacred Books of the East,' Volume XXV, p. 379) There can, it seems to me, be, no doubt, that the word *dharma* is a compendious term referring to certain prescribed classes of pious gifts and understood as such by the great writers on Hindu law, old as well as recent, and that it is not a mere vague and uncertain expression. Were it not so, it is scarcely likely that texts such as those of Katyayana and Manu in which occur expressions which mean—

*" that which has been appropriated to *dharma* " (Text, of Katyayana, cited in Colebrooke's 'Digest,' 3rd Edition, Volume II, page 471),

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* धर्मार्थे यन्निरूपितम् । (Mandlik's 'Vyavahara Mayukha,' Sanskrit text, p. 49).

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* "given for *dharma* by one" (Manu, chapter VIII, Verse 212),

† "what a man has promised for *dharma*," (Text of Katyayana cited in Colebrooke's 'Digest,' Volume I, page 400),

would have been phrased in the way they have been using, as they do, the term *dharma* as a well-understood word which required no explanation. The Smriti Chandrika, which ranks next only to the Mitakshara in this Presidency, puts the matter beyond the possibility of a doubt. In commenting on a text of Sankha which lays down: "sons cannot divide while their father lives although they have acquired a right to it (father's wealth) from (the time of their birth); they have no power to make such a partition, since they are not their own masters in respect of wealth (*artha*) and religious duties (*dharma*)", the author explains non-independence as to *dharma* as the sons' incompetence to do by themselves any ishta-poorta works and writes thus :—‡ "The absence of independent power in respect of religious duties (*dharma*) means, likewise, want of competence for the separate performance of religious sacrifices (*ishta*), and for the separate formation of tanks, &c., for charitable purposes (*poorta*). It must hence be understood that the son must maintain consecrated fire and perform other religious acts with the permission of his father and not without it." (Smriti Chandrika, Krishnaswami Iyer's translation, Ch. I, paragraph 22). According to this great authority the term *dharma* in contexts like this means *ishtapoorta*. Nor is it difficult to understand how the term came to bear such a meaning for, as is frequently the case, a word originally expressive of one thing is made also to denote other things with which the former has come to be closely associated and thus *dharma*, duty, *i.e.*, of liberality comes to mean also the meritorious forms in which that duty is best discharged.

Now, on the analogy of the principle with reference to which say, for instance, Hindu women are presumed to take only a limited interest in property given to them, on the ground that

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* धर्मार्थं येन दत्तं स्यात् ।(Mandlik's Manava Dharma Sasteras Vol. II, p. 1009).

† दत्तं श्रावितं वा धर्मकारणात् । (Ghose's Hindu law. 2nd Edn.p. 746).

‡ धर्मास्वातन्त्र्यमप्येवम् । पृथक् इष्टापूर्तादौ अप्रवृत्तिः । एवं च पित्रानुज्ञातेनपुत्रेण स्वकर्माग्निहोत्रादौ कार्यं नाननुज्ञातेनेति मन्तव्यम् ॥

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generally the donors in such cases do not wish to confer absolute powers of alienation, it seems but reasonable that Courts called upon to construe words of gift by a Hindu testator such as we have here, should treat the shastraic precepts inculcating the performance of the duty of liberality as therein pointed out and the universal observance thereof as shown by the innumerable religious and charitable endowments studded all over the country, as reasons with reference to which gifts for *dharma* could be upheld as intended and understood to be for definite objects known to the people, even were that word devoid of a technical import. How then could validity be denied to such gifts the word being, as I have endeavoured above to show, a term of art explained with precision by the highest authorities, and this from a time anterior to that within which the term *charity* in English law to which constant reference was made in the argument has acquired the artificial meaning it has there.

It is the non-recognition of the fact that the term *dharma* in connection with gifts by Hindus possesses a settled meaning that accounts for certain fantastic illustrations having been suggested as showing the length to which a decision upholding gifts such as the one in question would lead. Take, for instance, cobra-feeding to which counsel alluded before the Judicial Committee in *Runchordas Vandrawandas* v. *Parvatibbai*(1). Surely there is no text or commentary which lays down that such attention to the appetite of the dreaded reptile is among the meritorious acts of *ishta* or *poorta*. But even assuming it to be otherwise, execution of such a trust will have to be refused but only because in the opinion of our Courts the object was one detrimental to public weal, and the argument in question would seem to confound the question of uncertainty in regard to object with the question of the lawfulness thereof. The truth is that, as must be manifest from what has been stated, so far as one of the classes is concerned, viz., *ishta*, the objects are as certain as they can be, being connected with well-known rites prescribed by Shruti texts ; while as to *poorta* that is not less so having regard to the statements in the authorities as to instances thereof. These authorities are too numerous to be quoted here. Saraswati, as already stated, collates a number of them in his work on Endowments and the untranslated work of

(1) I.R., 26. I.A., p. 71.

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Hemadri, apparently deals with the subject at great length. It is sufficient to observe that the principle of the injunction as to *poorta* works is service to fellow beings though perhaps some of the forms in which such service is rendered such as tanks, wells, avenues, &c., are peculiar to the country,—charity, like water, taking its colouring from the soil through which it flows.

Such being the only view warranted, as it seems to me, by Hindu Law, I think I ought not to be deterred from giving effect to my conclusion by the decision in *Runchordas Vandrawandas* v. *Paravatibhai*(1), as not even a hint was given to their Lordshsips of the explicit and paramount authorities that exist on the subject and since, unlike as in Bombay and in Bengal, there is in this Presidency no course of decisions which precludes us from laying down a rule in accord with the highest indigenous declarations of the law and in consonance with the universal consciousness of the people with reference to a matter of the greatest importance whether regarded from the point of view of the interest of the community or the intentions of individual donors.

I would, therefore, modify the decree of the learned Judge by upholding the trust.

THE CHIEF JUSTICE.—The result will be the appeal is dismissed.

C. V. Vijiaraghavalu Naidu attorney for appellant.

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(1) L.R., 26 I.A., p. 71.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1907. March 8.

MARUDAYI AND ANOTHER (DEFENDANTS, NOS. 1 AND 2), APPELLANTS,

v.

DORAISAMI KARAMBIAN AND OTHERS (PLAINTIFF, AND DEFENDANTS NOS. 3 AND 4), RESPONDENTS.*

Hindu Law—Right of representation—Divided son as nearest sapinda does not exclude divided grandson or great grandson.

Partition does not annul the filial relation nor the right of succession incidental to such relation. The right of divided sons, grandsons, and great grandsons of the last male owner to succeed to his divided property, is the same as in the case of undivided family property. The right of representation exists equally in the former as in the latter case, and the divided son will not, on the principle of the exclusion of remoter by nearer sapindas, exclude the divided grandson in the succession to divided property of the ancestor.

Ramappa Naicken v. *Sithammal*, (I.L.R., 2 Mad., 184), referred to.

Muthuvaduganatha Tevar v. *Periasami*, (I.L.R., 16 Mad., 15), referred to.

SUIT for the recovery of possession of the plaint-mentioned lands with profits on the ground that the plaintiff, the first defendant's husband, the second defendant's father, and the father, of defendants Nos. 3 and 4 were brothers, that they and their father orally divided their properties 13 years ago, that each was enjoying his share separately, that their father lived with plaintiff and enjoyed the plaint properties till his death, that after his death, plaintiff was enjoying them since his other sons predeceased him, and that defendants who had no manner of right trespassed upon and wrongfully took possession of them.

Defendants Nos. 1 and 2 pleaded that the father was not given any particular share, but he was allowed to enjoy plaint items 1 to 3 till his death as well as mortgage rights over "Atham Pullam" for Rs. 200, on the understanding that it should be equally divided among his sons after his death and that plaintiff is entitled to only a quarter of them.

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* Second Appeal No. 1164 of 1904, presented against the decree of G. F. T. Power, Esq., District Judge of Tanjore, in Appeal Suit No. 1033 of 1903, presented against the decree of M.R.Ry. P. Aiyasami Mudaliar, District Munsif of Tiruvadi, in Original Suit No. 318 of 1902.

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The District Munsif found that the partition was complete, the father taking one share and the plaintiff and his three deceased brothers four shares. He held that the plaintiff being a nearer sapinda to his father than defendants Nos. 2—4 who were only grandsons, was entitled to the whole property and decreed plaintiff's claim. On appeal the District Judge confirmed the decree on the ground that the evidence showed that the plaintiff reunited with his father.

Defendants Nos. 1 and 2 appealed.

T. R. Venkatarama Sastri for the Hon. Mr. *P. S. Sivaswami Ayyar* for appellants.

T. V. Seshagiri Ayyar for first respondent.

JUDGMENT.—The plaint in this case alleges that the plaintiff and his father, after partition, were enjoying the properties obtained for their share by living together (*ore yogakshemamaga*) while the rest of the family were separately enjoying their respective properties. The written statement of the first and second defendants does not expressly deny this allegation, but contains in paragraph 11 a general denial of all facts not expressly admitted.

The plaintiff who was suing for possession had therefore to prove all the facts necessary to establish his title, and the first issue was framed accordingly as follows (omitting unnecessary words):—

"Whether the plaint property fell to the share of plaintiff's father and was in his and plaintiff's possession."

The plaintiff gave evidence himself and examined witnesses, and the District Munsif found on the first issue that the property was enjoyed by the plaintiff's father till his death and after that by the plaintiff until he was dispossessed. We have read the evidence and it certainly supports this finding, and as certainly does not support the decision of the lower Appellate Court that the plaintiff and his father reunited after partition.

It is indeed conceded that there is no evidence to support that decision; but it is urged that had the defendants distinctly raised the question instead of setting up a special case evidence might have been led to the point, and that we ought now to allow this to be done.

We do not think we can do so. In view of the defendants' general denial of the allegations on which he based his title, the plaintiff ought to have adduced the necessary evidence on the first issue, and to allow him to do so now would, having regard to the

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MARUDAYI v. DORAISAMI KARAMBIAN.

evidence already recorded, fall not far short of extending to him an invitation to adduce false evidence. It is indeed clear enough that neither the plaintiff nor any one on his behalf thought of setting up a case of partition and reunion until in the District Judge's Court it was seen that without such a case it might be difficult to be sure of complete success. The allegation in the plaint seems rather to allege that at the partition one share only was allotted to the plaintiff and his father, and the finding on the first issue is against that, as is also the evidence of the plaintiff himself. We therefore proceed on the footing that there was a complete partition and no reunion.

The question remains whether the plaintiff can, as has been held by the District Munsif, recover the whole of his father's share of the property, to the exclusion of his nephews, the second, third and fourth defendants. At the partition, the plaintiff's brothers, the fathers of the second, third and fourth defendants, received each his share, and the plaintiff received his. It is now contended for the plaintiff that, as the sole surviving son of his father, he excludes his nephews, the sons of the predeceased sons of the deceased.

In other words, the contention is that the plaintiff and his nephews being divided there is no coparcenary, and where there is no coparcenary there is no right of representation, and the plaintiff takes the whole of his father's estate as the nearest sapinda. This contention will not, in our opinion, bear examination. It is pointed out in West and Bühler's 'Hindu Law' that the Hindu treatises on the law of inheritance among sons and grandsons proceed on the assumption of a partition made immediately after the death of the 'propositus' (West and Bühler, third edition, page 68). This is probably correct; but a partition made prior to that event will not, in our opinion, affect the right of inheritance in either son or grandson. A partition "resolves joint rights into several rights. It frees so much of the estate as falls to the lot of the father from any present proprietary right on the part of the divided son, but it does not annul the filial relation, nor the right of succession which in the absence of disqualification, is incidental to that relation" (*Ramappa Naicken* v. *Sithammal*(1)). It was not suggested in the argument before us

(1) I.L.R., 2 Mad., 182 at p. 184.

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that this is not a correct exposition of the law, nor have we been referred to any case or to any text book of authority in which it has been called in question, and we have no hesitation in accepting and following it. This being the law, it cannot, we think, be logically contended that a partition annuls the relation of the grandson or the grandson's right of succession incidental to that relation unless it be upon the ground that the right of representation cannot under the Hindu Law exist where there is no existing joint family. It cannot be argued that a right of representation is incompatible with the existence of separate interests on the part of the heirs in the inheritance. No doubt Vijnaneswara and other commentators, in expounding the doctrine of representation with reference to the partition of the ancestral estate, speak of "unseparated brothers" (Mit. I v. 2; Saraswati Vilasa, Foulkes, sec. 207; but it does not follow that the same doctrine ought not to be applied among separated brethren. And as was pointed out in *Ramappa Naicken* v. *Sithammal*(1) if Vijnaneswara had understood partition to affect the laws of succession the Mitakshara would, in all probability, have contained an explicit declaration on the subject.

It must however be conceded that to allow a rule of succession *per stirpes* in a separated family is to admit an exception to the rule of Hindu Law by which the inheritance devolves on the nearest sapinda; but the exception is one which in our opinion necessarily follows from the exposition given by Vijnaneswara (Mit. 1. 1.3) of the rights of sons and grandsons in the estate of the grandfather. It is true that the exception does not extend to cognate or collateral relations but that is because they take an 'obstructed' inheritance, where the sons and grandsons take an 'unobstructed' inheritance. The difference is explained by Sir T. Muthusami Ayyar in *Muttuvaduganatha Tevar* v. *Periasami*(2), where he says "the distinction is material only to the extent that, in the one case the nearer male heir excludes the more remote, while in the other the doctrine of representation excludes this rule of preference. It is founded upon the theory that the spiritual benefit derivable from the three lineal male descendants is the same, though among collateral male heirs the *quantum* of such benefit varies in proportion to the remoteness of the male heir

(1) I.L.R., 2 Mad., 182 at p. 184. (2) I.L.R., 16 Mad., 11 at p. 15.

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MARUDAYI v. DORAISAMI KARAMBIAN.

from the deceased male owner. The rule that to the nearest sapinda the inheritance belongs applies alike whether the inheritance is 'obstructed' or 'unobstructed' with this difference, viz., that, where the last full owner leaves sons, grandsons, and great-grandsons, their sapinda relationship confers equal spiritual benefit on him though their blood relationship is not the same, and they are all coheirs within the meaning of the rule." These observations are applicable alike to separated and unseparated descendants of the male owner, for it cannot be contended that partition in any way affects the capacity of a son or a grandson to confer spiritual benefit upon his ancestor.

If then this *dictum* of Sir T. Muthusami Ayyar is accepted as declaring the true reason of the law the matter is quite clear; but if in spite of his authority we shrink from resting a rule of Hindu Law in this Presidency upon the doctrine of religious benefit, even in the case of sons and grandsons, we are nevertheless bound to recognise the rule itself and to give effect to it if its meaning is clear.

The Mitakshara gives to the grandson an 'unobstructed' right by his birth to the separate property of his grandfather (*vide* remarks of Telang, J., in *Apaji Narhar Kulkarni* v. *Ramchandra Ravji Kulkarni*(1), and partition does not annul it or convert it into an 'obstructed' right; therefore, the existence of a son cannot defeat it although both son and grandson are separated from their ancestor and from one another.

It may be said that if this is the correct view the grandson separated from his own father as well as from his grandfather ought, even in the life-time of his father, to take a share of his grandfather's estate. This right is denied to him by the Daya Bhaga (III. 1. 19) for reasons drawn from the doctrine of religious benefit; the question whether it cannot for the same reasons be denied to him in Madras is one which we need not discuss in this case.

We do not find in any of the text books to which we have been referred, any statement of the law which conflicts with the view we have endeavoured to set forth. The remarks in Sarvadhikari's 'Hindu Law' at page 881 where the learned author is dealing with the order of succession in a divided family may

(1) I.L.R., 16 Bom., 29 at p. 56.

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appear on a first reading somewhat to support the contrary view, but his adoption of the illustration given in Dayakrama Sangraha 1·3 and of the restriction enunciated in the next section of the same treatise, shows that when he lays down a rule that the son excludes the grandson, he means that he excludes his own separated son (*vide* also page 567).

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We are of opinion that the plaintiff is entitled to recover only one-third of his father's estate from the defendants, and we modify the decrees of the lower Courts accordingly with proportionate costs throughout (to be paid and received).

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

NATTU KRISHNAMA CHARIAR (PLAINTIFF), APPELLANT,

1907. March 5, 12.

v.

ANNANGARA CHARIAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act, Act IV of 1882, s. 85—Mortgagee holding two mortgages on same property and who has sued on the first mortgage and sold the property without mentioning the second mortgage, cannot sue on his second mortgage.

A mortgagee who is made a defendant under section 85 of the Transfer of Property Act and who omits to set up a mortgage is barred from suing on such mortgage when in consequence of his omission the property is ordered to be sold free from the mortgage which had not been pleaded.

Sri Gopal v. *Pirthi Singh*, (I.L.R., 24 All., 429), referred to.

A party holding two mortgages on the same property and suing on the first mortgage alone, is in respect of the second mortgage a party to the suit under section 85 of the Transfer of Property Act; and if he omits to mention, his second mortgage and the property is ordered to be sold free of such mortgage, he cannot afterwards sue to enforce his second mortgage against such property.

Sundar Singh v. *Bholu*, (I.L.R., 20 All., 322), dissented from.

Dorasamy v. *Venkatasesha Aiyar*, (I.L.R., 25 Mad., 108), followed.

SUIT to recover amount due on a hypothecation bond executed by first defendant, the undivided father of defendants Nos. 2 and 3 to fourth defendant by whom it was assigned to plaintiff.

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* Second Appeal No. 1381 of 1904, presented against the decree of R. D. Broadfoot, Esq., District Judge of Chingleput, in Appeal Suit No. 105 of 1904, presented against the decree of M.R.Ry. C. Krishnasamy Row, District Munsif of Conjeeveram, in Original Suit No. 599 of 1903.

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NATTU KRISHNAMA CHARIAR v. ANNANGARA CHARIAR.

The fourth defendant, who had a prior mortgage on the same properties from first defendant, had previously obtained a decree on his first mortgage without mentioning the second mortgage and in execution of such decree the mortgaged properties were purchased by defendants Nos 5 and 6. Defendants pleaded that the suit on the second mortgage was unsustainable under the circumstances.

The District Munsif decreed for plaintiff. His judgment was reversed on appeal and the plaintiff's suit was dismissed.

The plaintiff appealed to the High Court.

V. Krishnaswami Ayyar for appellant.

The Hon. Mr. *P. S. Sivaswami Ayyar* for respondent.

JUDGMENT.—This is a suit for the sale of property which was mortgaged by the mortgagor to the present mortgagee along with other property, and was then again mortgaged to him under the mortgage which is now sued on. The mortgagee sued on the first mortgage and obtained a decree for sale, and then brought the present suit for sale on the second mortgage. The District Munsif gave him a decree, but the District Judge reversed his judgment and dismissed the suit. It has been held by this Court in *Dorasami* v. *Venkatasesh Ayyar*(1) that a mortgagee is not entitled to bring a suit on a prior mortgage for sale of the mortgaged property subject to a subsequent mortgage in his own favour, but if he chooses to take the consequences there is, we think, nothing in law to prevent from bringing a suit on the first mortgage without reference to the subsequent mortgage and obtaining a decree for sale of the mortgaged property in satisfaction of the first mortgage and free from the second mortgage. This is what the plaintiff has done in the present case. Although he said nothing about the second mortgage in his plaint, still being in fact a party to the suit and a second mortgagee, he was, in our opinion, in the same position as regards the second mortgage as any other mortgagee under a mortgage other than the mortgage sued on who had been made a party defendant to the suit under section 85 of the Transfer of Property Act in accordance with the policy of the Act which requires all parties interested in the mortgaged property to be before the Court in order that they may have an opportunity of asserting their claims and be bound by the decree. In such

(1) I.L.R., 25 Mad., 108.

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NATTU KRISHNAMA CHARIAR *v.* ANNANGARA CHARIAR.

a case it was held by the Privy Council in *Sri Gopal* v. *Pirthi Singh*(1) that mortgagees who were made defendant under section 85 of the Transfer of Property Act and failed to set up a mortgage prior to the suit mortgage were barred from afterwards bringing a suit for sale on such prior mortgage which they might and ought to have set up in the former suit. The decree in the former suit to which they were parties ordered some of the mortgaged properties to be sold free of all incumbrances and the rest to be so sold after redeeming the prior debts scheduled in the decree. This was in effect a decision that the mortgaged property was to be sold free from the mortgage which had not been pleaded. Similarly in the present case the decree in the first suit between the same parties directed that the property should be sold free from the mortgage which is now sued on, and now to pass a decree for sale of the same property on the second mortgage would be inconsistent with the decree in the former suit.

Where a decree for the sale of mortgaged property is passed in a suit to which another mortgagee of the same property is not made a party, such mortgagee may be entitled in his turn to obtain a decree for sale on his mortgage, notwithstanding the confusion that may result, but that is not the present case. Here the mortgagee, when as a party to the former suit he omitted to put forward his rights under the second mortgage, consented to the property being sold free of the second mortgage, and waived his right to have it sold in satisfaction of such mortgage.

It may be open to him when the decree in the first suit is executed to enforce his claim on the second mortgage under section 97 of the Transfer of Property Act by proceeding against any surplus that remains after satisfying the decree, but he is not in our opinion entitled to maintain the present suit for sale on the second mortgage. The appellant has relied on the decision in *Sundar Singh* v. *Bholu*(2), but the grounds on which that case was decided are dissented from in *Dorasami* v. *Venkatasesh Ayyar*(3) and are, we think, opposed to the principles upon which the Privy Council proceeded in *Sri Gopal* v. *Pirthi Singh*(1) and we are accordingly unable to follow it.

The second appeal is dismissed with costs.

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(1) I.L.R., 24 All., 429. (2) I.L.R., 20 All., 322.
(3) I.L.R., 25 Mad., 108.

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APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Wallis.

1907. February 27. March 8.

SAMBASIVA AYYAR AND OTHERS (DEFENDANTS), APPELLANTS,

v.

VISVAM AYYAR (PLAINTIFF), (AND HIS L.R.), RESPONDENT.*

Hindu Law—Gift to widow, construction of.

A and *B* brought a suit against *C* for division of what *A* and *B* alleged to be joint family property and *C* alleged to be his divided property. A died and *V* his widow was brought on the record as his representative. *V* and *B* withdrew from the suit on *C* giving them, jointly, some lands under a deed, which recited that *C* gave the lands as a matter of favour at the request of *V* and *B* to be enjoyed by *V* and *B* in equal portions with the right of gift, sale, etc. *V* devised her share to *D*. In a suit by *B* to recover the lands from *D*, held:

Per MILLER, J.—There was nothing in the circumstances of the case to raise any presumption based on the sex of *V* that the gift to *V* was one for life only, in the face of the express words of the deed which purport to convey an absolute estate:

Per WALLIS, J.—In construing such documents, the situation of the parties and their rights at the time must be taken into consideration. There is nothing in the circumstances or the document to show that *C* intended to enlarge the widow's interest in the property given her to full ownership. The words 'you shall enjoy the said lands with the rights of gift, sale, &c.', do not necessarily indicate such an intention. *V* therefore took only a widow's estate in the properties given by the deed.

Dinonath Mukerji v. *Gopal Churn Mukerji*, (8 C.L.R., 57), referred to.

Sreemutty Rabutty Dossee v. *Sib Chunder Mullick*, (6 M.I.A., 1), referred to.

THE suit was for possession of the plaint lands, together with past profits. The plaintiff alleged that the said lands belonged to his family and were in the possession of his brother's son's widow, Venkammal, with his consent, and that the said Venkammal having died on 4th October 1898, he was entitled to take possession of them. He further alleged that the defendants were holding wrongful possession of the said lands. The defendants Nos. 1 and 2 pleaded that the plaint lands belonged, originally, to Meenakshi Iyer, a natural brother of the plaintiff, but adopted into another family and were given together with some other

* Second Appeal No. 638 of 1904, presented against the decree of J. Hewetson, Esq., District Judge of Trichinopoly, in Appeal Suit No. 8 of 1903, presented against the decree of M.R.Ry. S. Ramaswami Ayyangar, District Munsif of Kulitalai, in Original Suit No. 293 of 1902.

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properties, not in suit, to the plaintiff, and the said Venkammal, under a karar, dated 19th April 1865, to be enjoyed by them absolutely and with full powers of alienation, that, in the division of the said properties soon after between Venkammal and the plaintiff, the plaint lands went to the former's share and were enjoyed by her in her own right for over 30 years, that she made a gift of items Nos. 1 to 5, 8 and 9 to her brother, the first defendant under a deed of gift, dated 4th May 1895, and then bequeathed the items Nos. 6 and 7 also to him by a will executed by her on 30th September 1898 and that the first defendant has consequently been enjoying the plaint items since the date of the gift and the date of Venkammal's death.

The material portions of the karar, the construction of which was the substantial question in the case were as follows:—

"Agreement executed on 19th April 1865 corresponding to 9th Chitrai, Kurothana, to you 1. Venkammal, wife of Mathuru Bhuthayyan, residing in Mutharasanallore, Trichinopoly Taluk and 2. Visvam Iyen, son of Perayyen, by Minakshi Iyen. . . . I out of regard that you are related to me by blood took you into my adopted family as you who are my blood relatives and Panchanadha Iyen and Sambayyan had not much property. . . . I gave you as a matter of favour the properties in the Mutharasanallore village. . . . All these properties I have given to you on the condition that you should enjoy them in equal portions and that I should get the patta thereof made in your name. . . . You shall enjoy the said lands, etc., with the rights of gift, sale."

The further facts necessary for the report appear in the judgment. The District Munsif dismissed the suit, holding that Venkammal had an absolute right to her share under the karar.

On appeal his judgment was reversed and the plaintiff's claim decreed.

Defendants appealed to High Court.

Sir *V. Bhashyam Ayyangar* and *K. S. Gopalaratnam* for appellants.

The Hon. Mr. *P. S. Sivaswami Ayyar* for first respondent.

T. V. Seshagiri Ayyar for second respondent.

JUDGMENT.—MILLER, J.—In 1863 Madurbuthayyan and his uncle Visvam Ayyan (the plaintiff) sued one Minakshi Ayyan for partition of certain property alleged by them to belong to a joint

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family of which they and he were members, but which according to him formed part of his and his adoptive father's share of that property after division.

Madurbathayyan died pending the suit and Venkammal his widow was brought on the record apparently as his representative though how she was entiled to demand a partition after his death is not easily seen. Then the matter in controversy was settled out of Court by a 'karar' exhibit I, under which Minakshi Ayyan gave to Venkammal and Visvam Ayyan certain land in equal shares in consideration of their withdrawing the suit and transferring to his name the revenue registry in respect of some other land. Venkammal disposed of her share by gift and will to the defendants, and Visvam Ayyar now sues to recover it as ancestral property of his family.

The District Munsif dismissed the suit, but the District Judge, holding that Venkammal took only a widow's estate under exhibit I, has given the plaintiff a decree for possession.

The question is one of the proper construction of exhibit I which in terms conveys an absolute title to both donees.

It has to be remembered that, at the time when exhibit I was executed, Venkammal had no claim which she could enforce against Minakshi Ayyan in that suit. Her claim was only to maintenance, and for that Visvam Ayyan was as much responsible as Minakshi Ayyan, assuming that the family was undivided.

If the family was then divided, and it is found in this suit by both Courts that it was divided before the suit of 1863, then Venkammal had no claim against Minakshi Ayyan.

If Minakshi Ayyan had been able by a gift to get Visvam Ayyan to withdraw the suit for partition, Venkammal clearly could not have continued it.

In these circumstances I find it difficult to infer, as we are asked to do, that Minakshi Ayyan gave Venkammal what would have come to her on her husband's death had the gift been to her husband while he was alive and had he agreed to withdraw the suit. It is, I think, unsafe to attempt in this way to arrive at Minakshi Ayyan's view of the situation. We must take the circumstances as they stood at the time of the gift and construe the gift with their aid and with the aid of the words of the document itself. At the time of the gift Venkammal was, on the footing that the family was undivided, entitled as against

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Minakshi Ayyan to receive from him a portion of her maintenance, and on the footing that the family was divided, to receive from him nothing at all. He was, indeed, not entitled to make over to her her husband's share. If the family was undivided that belonged to Visvam Ayyan as much as to him.

We may then either take the view that something was given to Venkammal to present her from opposing the withdrawal of the suit, though she could not have successfully done so, or adopt the suggestion that what was given was given as that portion of the maintenance allowance which, if the family were held to be undivided, Minakshi Ayyan might have been bound to provide.

A third possibility, and one which seems to me at least as likely as either of the others, is that Minakshi Ayyan knew he had a good case, but knew also that he was comparatively rich and his relatives were poor, and, as he alleged in exhibit I, gave to Venkammal a small portion of his property as a matter of favour.

In none of these cases does there, in my opinion, arise any presumption (based on the sex of Venkammal) that what was given to her was a life estate or other limited estate. Certainly there is no presumption which can stand against the express words of exhibit I, which purport to convey an absolute estate and do not draw any distinction between the two donees. On the other hand, the presumption seems to be that Minakshi Ayyan gave the two donees the same estate in the property given and that he gave to Venkamml what he would have given her husband.

I have not thought it necessary to discuss the various cases cited at the bar. The only one which really touches the main question before us is *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick*(1), and there the facts were very different. The property taken by the widow was clearly given to her as the share of her deceased husband to which she was entitled.

I would, therefore, allow the appeal and restore the decree of the Court of First Instance.

WALLIS, J.—It is, of course, open to parties effecting a partition to agree as among themselves, as one of the terms of a

(1) 6 M.I.A., 1 at p. 16.

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compromise, that a widow of a deceased member of the family should take the property assigned to her as full owner and not for life only, and though an agreement in these terms might not be binding and might even be a fraud on members of the family not parties to the compromise, it would stand good as between the parties. It must, however, I think, appear clearly from the instrument by which effect is given to the compromise, that it was the intention of the parties to enlarge the estate which the widow would ordinarily take. This is, of course, a question of construction of the document, but, in construing documents such as this, the situation of the parties must be looked at, and the deed must be construed with reference to the situation of the parties and their rights at the time the deed was executed (*Sreemutty Rabutty Dossee* v. *Sibchunder Mullick*(1), *Dinonath, Mukerji* v. *Gopal Churn Mukerji*(2), and *Ganpat Rao* v. *Ram Chandar*(3)). In these cases it was held applying this rule of construction that an instrument of compromise did not give the widow a larger estate than she was entitled by law to claim, but the facts were somewhat different from those of the present case. In the first case, the property given to the widow was in satisfaction of her admitted rights as a widow, and the deed merely settled the amount to which she was entitled. In the second case, the widow had established her rights as a widow in litigation, which went up to the Privy Council, and the deed was in settlement of the claims so established. In the third case also, the claim of the widow on the property, at least to the extent of maintenance, was admitted, and the deed was construed as having been entered into in settlement of such claims. The peculiar feature of the present case is that the deed, executed by the defendant in the partition suit, and accepted by the plaintiffs in that suit, who were the widow and the plaintiff in the present suit as embodying the terms on which the suit was compromised in effect, denies that the plaintiffs had any rights in the property which they were seeking to partition, and conveys a comparatively small portion of the plaint property to them at their request as a matter of favour. Too much importance, however, should not, I think, be attached to this statement which may well have been inserted by the executant

(1) 6 M.I.A., 1 at p. 16. (2) 8 C.L.R., 57.
(3) I.L.R., 11 All., 296.

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in order that the deed might not afterwards be relied upon against him by other persons as an admission of the partible character of the property. Whether the claim was, in fact, an unfounded one or not, depends upon whether the family which had once divided had afterwards re-united, and, as the District Judge points out, it is not now easy to form an opinion on this question on such evidence as is forthcoming forty years later. What we have to consider is whether the terms of the deed viewed as a whole manifest with sufficient clearness an intention to give the widow a larger estate in the property conveyed to her than she claimed, or was entitled to claim in the suit which was compromised by the deed, and to decide this question, it will be convenient to summarise the provisions of the deed. It recites that one of the plaintiffs, the husband of the other, and the defendant were all descended from a common ancestor; that the defendant had been adopted by another son of the common ancestor; that, out of regard for their relationship by blood, he had taken them and two other members into his adopted family; and that he had been enjoying all the property of the adopted family with pattah for some lands in the name of Venkatarama Aiyar. This man, it should be noted, was a member of the executant's natural, and not of his adoptive, family, and the fact of the property standing in his name would be some evidence of re-union. The deed goes on to recite that disagreements had broken out and the plaintiffs had sued for partition without mentioning the defendant's rights by adoption and, as if no adoption had taken place, and that at their request he had consented to give them certain lands as a matter of favour. The deed conveys to the widow and the other plaintiff, who is also the plaintiff here, certain items of property to be enjoyed in equal portions with the pattah standing in their names, on the condition that they should get the pattah in the name of Venkatarama Aiyar transferred to the executant's name, and concludes with the words "you shall enjoy the said lands with the rights of gift, sale, etc." As pointed out in *Dinonath Mukerji* v. *Gopal Churn Mukerji*(1) these words are words of common form borrowed from Regulation XXV of 1802, and were probably inserted rather for the purpose of making it clear that the transferor had ceased to have any interest in the property

(1) 8 C.L.R., 57.

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transferred than for the purpose of describing the interests which the widow and the other donee were intended respectively to take. The motives of the donor, in this case, were probably mixed, and cannot now be accurately ascertained, but there does not appear to be any particular reason why he should have been anxious to enlarge the widow's interest in the property given her in compromise of the suit to full ownership. The provision that the property is to be enjoyed by the widow and the present plaintiff in equal portions does not expressly say that the widow was to have anything more than the enjoyment of her share for life with, of course, the power of alienating it for her own life. On the whole, I have come to the conclusion, not without some hesitation, especially in view of the fact that my learned brother takes an opposite view, that, under the terms of the deed, the widow was not intended to take more than a provision for life, which is all she can be considered as having claimed in the suit.

I am, therefore, of opinion, that the second appeal must be dismissed with costs.

Under the provisions of sections 575 and 587 of the Civil Procedure Code the second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. March 7, 8, 19.

DHARANIKOTA VENKAYYA (LEGAL REPRESENTATIVE OF PLAINTIFF), APPELLANT,

v.

BUDHARAZU SURAYYA GARU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act, Act IV of 1882, *s.* 99—*Mortgaged property purchased by mortgagee in execution of a money decree on the mortgage debt, not redeemable by the mortgagor.*

A mortgagee sued the mortgagor for an instalment of the mortgage debt and obtained a simple money decree. In execution of such decree, the mortgagee

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* Second Appeal No. 788 of 1904, presented against the decree of M.R.Ry. T. Varada Row, Additional Subordinate Judge of Godavari at Rajahmundry, in Appeal Suit No. 100 of 1902, presented against the decree of M.R.Ry. R. A. Krishnaswami Ayyar, District Munsif of Cocanada, in Original Suit No. 10 of 1901.

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brought to sale and purchased the mortgaged property. In a suit by the mortgagor brought to redeem the mortgaged property : DHARANIKOTA VENKAYYA v. BUDHARAZU SURAYYA GARU.

Held, that the mortgagor, having been a party to the decree and to the order for sale, was not entitled to redeem.

Muthuraman Chetty v. *Ettappasami*, (I.L.R., 22 Mad., 372), followed.

Mortand Balakrishna Bhat v. *Dhondo Damodar Kulkarni*, (I.L.R., 22 Bom., 624), dissented from.

Kamini Debi v. *Ramalochan Sirkar*, (5 B. L.R., 450), dissented from.

SUIT for redemption of land and dwelling house.

The plaint properties were mortgaged by plaintiff under a deed of conditional sale on 17th May 1870.

The mortgagee, first defendant's husband, instituted Original Suit No. 84 of 1873 for a portion of the amount due on the mortgage deed and obtained a decree in execution of which the mortgaged properties were brought to sale and purchased by the decree-holder. Subsequently Original Suit No. 10 of 1894 was instituted by the plaintiff for possession of the same property alleging that the mortgagee had orally agreed, after the sale in execution of the decree in Original Suit No. 84 of 1873, to hold the lands as under a lease and to credit the profits towards the liquidation of the mortgage debt, and this suit was dismissed. Plaintiff then instituted the present suit for redemption.

The plaintiff contended *inter alia* that under section 99 of the Transfer of Property Act the mortgagee cannot, in execution of a decree for the satisfaction of any claim arising out of the mortgage or not, bring to sale the mortgaged property without a previous suit for foreclosure.

The District Munsif dismissed the suit and his decree was confirmed on appeal by the Subordinate Judge.

The legal representative of plaintiff appealed.

The Hon. Mr. *P. S. Sivaswami Ayyar* for *V. Krishnaswami Ayyar*, and *P. Nagabhushanam* for appellant.

V. Ramesam and *P. Narayanamurti* for third to seventh respondents.

JUDGMENT.—In this case the plaintiff in 1870 executed a mortgage by conditional sale (exhibit A) in favour of the first defendant's husband, who instituted Original Suit No. 83 of 1873, and obtained a decree against the present plaintiff, in execution of which he purchased the mortgaged property and obtained a sale certificate, dated the 24th June 1874. The decree and pleadings in the suit are not forthcoming, but the District Munsif has found,

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DHARANIKOTA VENKAYYA v. BUDHARAZU SUBAYYA GARU.

and the District Judge has apparently agreed with him, that the terms of the sale certificate show that the decree obtained by the mortgagee was a money decree for an instalment of the mortgage debt. The plaintiff subsequently brought two suits, Original Suit No. 263 of 1886, and Original Suit No. 10 of 1894, for the recovery of the property which were unsuccessful, and finally brought the present suit, Original Suit No. 10 of 1901, claiming the right to redeem. The claim to redeem was based in both the lower Courts on the fact that the mortgaged property had been purchased by the mortgagee in execution of the money decree obtained by the mortgagee in respect of the mortgage debt; and it was argued that on the principle of equity embodied in section 99 of the Transfer of Property Act, but existing before and independently of that section that a mortgagee could not by such a sale and purchase free himself from the liability to be redeemed even twenty-seven years after the date of the sale and purchase. This rule of equity appears to have been established by the decisions of the Calcutta High Court before the passing of the Transfer of Property Act for the protection of the mortgagor's right to redeem against the facilities which Indian procedure afforded the mortgagee of defeating it by bringing the equity of redemption to sale and purchasing it himself; but we have not been referred to any case in which the rule was recognized or enforced in this and the Bombay High Court before the passing of the Act. It has now been settled by a decision of the Privy Council that, independently of section 99, it does not apply to cases where the mortgagee brings the property to sale in execution of a decree not obtained for the mortgage debt. Vide *Khiarajmal* v. *Daim*(1), *Nannuvien* v. *Muthusami Dikshadar*(2) and *Muhammad Abdul Rashid Khan* v. *Dilsukh Rai*(3), but the first of these cases contains the following passage :—" Their Lordships throw no doubt on the principle, which has been acted on in many cases in India, that a mortgagee cannot, by obtaining a money decree for the mortgage debt, and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken, and with the other safeguards usual in a suit on the mortgage." Their Lordships, it should be noted, had not to consider how far this principle should be applied, but were merely guarding them-

(1) I.L.R., 32 Calc., 296. (2) I.L.R., 29 Mad., 421.
(3) I.L.R., 27 All., 517.

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selves against being supposed to decide anything in conflict with Indian decisions on the subject, and it is therefore necessary to look to the Indian case to see how the principle is to be applied. For the respondents, it is admitted that a money decree was obtained for the mortgage debt and that the principle is therefore applicable; but it is contended that a purchase by the mortgagee in contravention of this principle was voidable only and not void and that parties to the suit in which the order for sale was made are bound by it and cannot afterwards claim to redeem. The language of their Lordships in the last mentioned case lends some support to this view. The ground on which they allowed redemption was that the plaintiff had not been properly represented in the suits in which the orders for sale were made. After pointing out that in one of the suits (160) the sale was not for the mortgage debt, and so not within the application of the principle, they proceed "In any case the point taken by the appellate Judge (the purchase by the mortgagee) would not be a cause of nullity for want of jurisdiction, but a cause of irregularity in procedure only," and therefore apparently a suit for redemption would not lie. The point arose more directly with regard to the sales in the other suit (372) which was for the mortgage debt and as matters affecting these sales had been referred to arbitration, their Lordships were not called upon to consider the precise point which now arises. Coming now to the Indian cases, we find that in *Kamini Debi* v. *Ramlochan Sirkar*(1), it was held that where a creditor lent money under an agreement and afterwards took a mortgage from the debtor, and then sued and obtained a money decree on the original agreement, and attached and purchased the mortgaged property in execution of this money decree, he became a trustee for the mortgagor, and was liable to be redeemed in a suit brought four years after the sale. This decision is an authority in the plaintiff's favour, but it was held by the Privy Council in *Mahabir Pershad Singh* v. *Macnaghten*(2) that it could only be supported on the supposition that the decree holder had not obtained leave to bid, as if he had, the sale could not be questioned. The facts of the two cases, it may be observed, were not identical. In *Kamini Debi* v. *Ramlochan Sirkar*(1), the mortgagee purchased in execution of a money decree whereas in

(1) 5 B.L.R., 450. (2) I.L.R., 16 Calc., 682.

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Mahabir Pershad Singh v. *Macnaghten*(1), there was a decree for sale of the mortgaged property.

In *Naranappa* v. *Samacharlu*(2) it appears to have been assumed that independently of the Transfer of Property Act there was no rule of equity applicable to the circumstances of the present case, but in *Martand Balkrishna Bhat* v. *Dhondo Damodar Kulkarni*(3), a mortgagee who had purchased the mortgaged property in execution of a money decree for other debts and without obtaining leave to bid was held liable to be redeemed as to the whole property by a member of the undivided family of the mortgagors who was absent at the date of suit and not made a party to it. In the judgment, however, he was treated as a party and redemption was allowed on the broad ground that the mortgagee's purchase under the above circumstances had not freed him from the liability to be redeemed; but in *Muthuraman Chetty* v. *Ettappasami*(4), where the mortgagee had purchased the mortgaged property in execution of a money decree for an instalment of the mortgage debt, a member of the undivided family of the mortgagors born after the decree but before the attachment and sale, and not added as a party was held entitled to redeem his own share of the joint family property as not being bound by the sale, but was not allowed to redeem the share of the members of the joint family who were parties to the decree and order for sale. This case appears to be a direct authority against the plaintiff in the present case who was a party to the suit and order for sale; and we think we should follow it in preference to *Kamini Debi* v. *Ramlochan Sirkar*(5), the authority of which has been shaken by *Mahabir Pershad Singh* v. *Macnaghten*(1), and to *Martand Balakrishna Bhat* v. *Dhondo Damodar Kulkarni*(3) which this Court has refused to follow in *Nannuvien* v. *Muthusami Dikshadar*(6). The recent case *Muthu* v. *Karuppan*(7), was not that of a mortgagee purchaser, and the present question did not arise for decision. For the foregoing reasons we agree with the decision of the Courts below, and dismiss the second appeal with costs.

(1) I.L.R., 16 Calc., 682.
(2) I.L.R., 19 Mad., 382.
(3) I.L.R., 22 Bom., 624.
(4) I.L.R., 22 Mad., 372.
(5) 5 B.L.R., 450.
(6) I.L.R., 29 Mad., 421.
(7) I.L.R., 30 Mad., 313.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Miller.

1907. April 24.

CHINNAMMAL ACHI AND OTHERS (PLAINTIFFS NOS. 1, 3 AND 4 AND LEGAL REPRESENTATIVES OF THE FIRST PLAINTIFF), APPELLANTS,

v.

SAMINATHA MALAVAROYAN (DEFENDANT), RESPONDENT.*

Revenue Recovery Act (Madras), Act II of 1864, *s.* 59, *and Regulation VII of* 1828 *—Cause of action to set aside sale under s.* 59 *arises when sale is confirmed and not from date of Collector's order on revision.*

The period of six months allowed for suits to set aside sales under section 59 of Madras Act II of 1864 must be calculated from the date when the sale is confirmed, and not from the date when the Collector on revision under Regulation VII of 1828 passes his final order

The party is aggrieved when the sale is confirmed and the fact that it was open to him to move the Collector does not postpone his cause of action.

Sabapathy Chetty v. *Rengappa Naicken*, (I.L.R., 26 Mad., 495), distinguished.

SUIT for recovery of lands.

The plaint lands were sold at Court auction and plaintiffs purchased them in July 1900. The lands were brought to sale for arrears of revenue under Madras Revenue Recovery Act and were purchased by defendant on 10th July 1901, and the sale was confirmed by Head Assistant Collector on 28th September 1901. The plaintiffs petitioned the Collector under Regulation VII of 1828, and their petition was rejected on 10th May 1902. The suit is instituted by plaintiffs on the 9th July 1902.

The defendant pleaded *inter alia* that the suit was barred by limitation.

The District Munsif held that the suit was not barred and decreed for plaintiffs.

On appeal his judgment was reversed and plaintiffs' suit dismissed.

Plaintiffs preferred this second appeal.

T. Narasimha Ayyangar for second to fourth appellants.

T. Natesa Ayyar for respondent.

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* Second Appeal No. 1414 of 1904, presented against the decree of M.R.Ry. T. M. Rangachariar, Additional Subordinate Judge of Tanjore, in Appeal Suit No. 1182 of 1903, presented against the decree of M.R.Ry. S. Authynarayana Ayyar, District Munsif of Valangiman, in Original Suit No. 184 of 1902.

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CHINNAMMAL ACHI v. SAMINATHA MALAVAROYAN.

JUDGMENT.—We think the decision of the Subordinate Judge is right, and that the cause of action arose on the date on which the Head Assistant Collector confirmed the sale. The Head Assistant Collector made the order of confirmation by virtue of the powers conferred on him by Regulation VII of 1828, and his order was therefore subject to revision by the Collector, but it was none the less a final order unless and until it was revised and it was the order by which the sale was confirmed. It was when the sale was confirmed if at any time that the appellant was aggrieved by proceedings taken under Act II of 1864 (Madras), and the fact that it was open to him to move the Collector to revise the order of the Head Assistant Collector does not in our opinion postpone his cause of action until the decision of the Collector is passed.

In *Sabapathy Chetty* v. *Rengappa Naickan*(1) it was decided in effect that the sale is incomplete until confirmed, but that case gives no support to the contention that a sale is incomplete until the Collector decides whether or not to revise the order of the officer confirming the sale.

We dismiss the second appeal with costs.

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(1) I.L.R., 26 Mad., 495.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Benson and Mr. Justice Miller.

SUBBA REDDI (MINOR) BY NEXT FRIEND, LAKSHMAMMAL (PLAINTIFF), APPELLANT IN L.P.A. Nos. 15 AND 16 OF 1906,

1906. December 8. 1907. April 8.

v.

DORAISAMI BATHEN AND OTHERS (DEFENDANTS), RESPONDENTS IN L.P.A. No. 15 OF 1906,

PAPAMMAL AND OTHERS (PLAINTIFF AND DEFENDANTS Nos. 1 TO 5), RESPONDENTS IN L.P.A. Nos. 16 OF 1906.*

Hindu Law, will—Will of self-acquired property of Hindu testator not revoked by birth of posthumous son—Hindu Wills Act, Act XXI of 1870, ss. 2 and 3—Indian Succession Act, Act X of 1865, ss. 56, 57—Under ss. 2 and 3 of the Hindu Wills Act and ss. 57 of the Indian Succession Act, a will to which the Hindu Wills Act applies can be revoked only in the modes provided in s. 57 of the Succession Act.

The incorporation of section 57 of the Indian Succession Act in the Hindu Wills Act and the enactment of the provision of section 3 of the latter Act show clearly that the Legislature intended that the rule of revocation by a change of circumstances should not be applied to the wills of Hindus. Section 57 of the Succession Act is exhaustive, as it provides that a will shall not be revoked except in certain ways. Wills of Hindus to which the Hindu Wills Act applies, can be revoked only in one of the modes, excepting marriage, provided in section 57 of the Succession Act.

A will by a Hindu of self-acquired property to which the provisions of the Hindu Wills Act apply, is not therefore revoked by the birth of a posthumous son.

The same rule must be applied in the case of wills not governed by the Hindu Wills Act, as to apply a different rule to them will be inconvenient as well as illogical.

ONE Chenga Reddi, on the 7th March 1900, executed a will by which he disposed of his self-acquired properties in favour of his two widows, his daughters and others including his brother's

* Appeals Nos. 15 and 16 of 1906, under clause 15 of the Letters Patent, presented against the judgment of Subrahmania Ayyar and Moore, JJ., dated 12th March 1906, in Second Appeals Nos. 81 and 82 of 1904, confirming, under section 575 of the Code of Civil Procedure, the decrees of the District Court of Chingleput in Appeal Suit Nos. 538 and 537 of 1902, respectively. (Original Suits Nos. 524 and 934 of 1901 on the file of the Tinnevelly District Munsif's Court.)

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SUBBA REDDI v. DORAISAMI RATHEN.

daughter who is the plaintiff. He died seven days after making the will. He had no son when he died and he did not know that his second wife was then *enceinte.*

In November 1900 his second wife gave birth to a son. These suits were brought by the brother's daughter and others to recover their legacy under the will of Chenga Reddi, and it was objected on behalf of the posthumous son that the will became void on his birth. The District Munsif and the District Judge held that the will did not become void and decreed for plaintiff. On second appeal to the High Court, Subrahmania Ayyar, J., and Moore, J., differed, and the judgment of the latter dismissing the appeals prevailed.

Against these judgments, appeals were preferred under clause 15 of the Letters Patent.

P. R. Sundara Ayyar for appellant.

Mr. *Joseph Staya Nadar* for respondent.

JUDGMENT—Sir ARNOLD WHITE, C.J.—The question raised in this appeal is—Is a will of self-acquired property, made by a Hindu, revoked by the birth of a posthumous son of the testator? The case is one of first impression, and was fully argued by Mr. Sundara Ayyar in support of the contention that the birth of the son had the effect of revoking the will. This view was accepted by Sir Subrahmania Ayyar, J. In the view which I take of the case it is not necessary for me to discuss Sir Subrahmania Ayyar's judgment, though I desire to express my appreciation of the research and learning which the judgment shows. Moore, J. differed from Sir Subrahmania Ayyar, J. I think Moore, J.'s decision was right and that the birth of the son did not operate so as to revoke the will. The question stated broadly is—Is the case to be decided with reference to what has been called Hindu sentiment and the spirit of the Hindu Law or with reference to the provisions of the Hindu Wills Act. Section 56 of the Succession Act (X of 1865) which provides that a will shall be revoked by the marriage of the maker is not included amongst the enactments which, by section 2 of the Hindu Wills Act (XXI of 1870), are made applicable to wills made by Hindus. Section 57 of the Succession Act, which provides for the modes in which a will may be revoked, was made applicable to Hindu wills subject to the proviso contained in section 3 of the Hindu Wills Act that marriage shall not revoke a Hindu will. As regards section 56 of the Succession Act, which closely follows section 18

of the English Wills Act (1 Vict., c. 26) it is clear that the intention of the legislature was to lay down a hard and fast rule with regard to wills executed by testators to whom the Act applies with a view to prevent questions being raised as to presumptions of intention. Section 18 of the English Act provides in express terms that a will shall not be revoked by any presumption of an intention on the ground of an alteration in circumstances. This section is not reproduced in the Succession Act, but, reading sections 56 and 57 of that Act together, there can be no doubt that, under the Succession Act, the law as to the revocation of wills, is the same as the law of England under the Wills Act. In legislating with reference to the question of the extent to which the provisions of the Succession Act should be made applicable in the case of wills executed by Hindus, the legislature must be taken to have considered the extent to which the enactments of the Succession Act were in keeping with Hindu sentiment and with the spirit of the Hindu Law. The outcome was that the English rule of law that marriage should operate so as to revoke a will was expressly excluded in the case of wills made by Hindus, whilst, by the later provisions of section 3, certain restrictions were placed on the testamentary powers of Hindus. Presumably the English rule that marriage should operate so as to revoke a will was excluded upon the ground that, so far as Hindus were concerned, marriage did not raise a presumption of intention. This no doubt is in harmony with Hindu sentiment. When dealing with the question of presumptions arising from change of circumstances, the legislature made no provision for giving effect to any presumption arising from the birth of a son. At the same time they made section 57 of the Succession Act, which provides for the modes in which a will may be revoked, applicable to Hindu wills subject to the proviso contained in section 3 of the Hindu Wills Act. The Hindu Wills Act not only does not provide for revocation on the ground of any alteration in circumstances, but by incorporating section 57 of the Succession Act, it makes express provision for the way in which a will shall be revoked. The language of the section is not that a will may be revoked in certain ways, but that no will shall be revoked except in certain ways. I think the section is exhaustive. In my opinion, as regards wills to which the Hindu Wills Act applies, the question is governed by statute. As a matter of fact, the Hindu Wills Act does not

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SUBBA REDDI v. DORAISAMI BATHEN.

apply to the will in question, but it would be in the last degree inconvenient to apply one rule in the case of wills made within the local limits of the jurisdiction of this Court (to which the Act applies) and another rule to wills executed outside the local limits, and it was not contended that this could be done.

I think the judgment of Moore, J. should be upheld, and the appeals dismissed with costs.

BENSON, J.—I am of the same opinion. The Hindu Wills Act, which was passed in 1870, recites that "it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation and probate of the wills of Hindus * * * " in certain places including the town of Madras, and then enacts *inter alia* that section 57 of the Indian Succession Act, 1865, shall apply to (*a*) all wills made by Hindus, on or after the 1st September 1870, within any of the said places and (*b*) all such wills made outside those places, so far as relates to immoveable property situated within those places.

Section 57 runs as follows: "No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction, with the intention of revoking the same," and section 3 of the Hindu Wills Act adds "Provided that marriage shall not revoke any such will or codicil." In my judgment the plain meaning of these provisions of the law is that no unprivileged will to which the Hindu Wills Act applies shall be revoked otherwise than as provided in section 57, omitting the reference to marriage. It is, however, argued for the appellant, that the Hindu Wills Act does not deal with the substantive law of wills, which is the creature of a series of judicial decisions, but merely provides rules of procedure for the proper exercise of the testamentary power. In support of this argument reference is made to the terms of the preamble quoted above, and to certain observations in the case reported in *Alangamonjori Dabee* v. *Sonamoni Dabee*(1). It is further contended that section 57 merely relates to the revocation

(1) I.L.R., 8 Calc., 637.

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of wills by some *act* of the testator, and does not deal with the invalidity which the Courts ought to attach to a will on the birth of a posthumous son to the testator, in order to give effect to what may be presumed to be a general sentiment among Hindus in favour of such invalidity.

The first of these contentions is untenable since the Hindu Wills Act incorporates sections 46 and 49 of the Succession Act which expressly declare the testamentary power and the liability of a will to be revoked by the maker, and section 48 which enacts that a will is void under certain circumstances. Nor can I accept the further contention with regard to the scope of section 57. To do so puts too great a strain on the language of the section. The section is, I think, exhaustive, as its language implies.

The legislature has considered whether the subsequent marriage of the testator should be held to revoke his will, and has expressly decided that it shall not have that effect. It is difficult to suppose that the legislature had not also then before it the kindred question as to whether a will should be revoked by the birth of a posthumous son, for the propriety of such a rule had long been a subject of discussion among writers on jurisprudence, and the terms of section 57, as modified by section 3 of the Hindu Wills Act, indicate clearly enough that the legislature did not think fit to enact the rule which we are now asked to promulgate by judicial decision.

I would add that, in my opinion, the matter is one which is more suitable for decision by the legislature than by the Courts, for the latter have not the same facilities or machinery as the legislature for ascertaining the general sentiment which must be the foundation for any rule of the kind that may be adopted.

For example, by what means can the Courts ascertain whether the general sentiment, even if it be in favour of such a rule in the case of posthumous sons, is or is not also in favour of a similar rule in the case of the birth of sons after the making of the will but during the testator's lifetime, or whether it should be confined to legitimate sons or should include also illegitimate sons of a concubine continuously kept, for such sons are looked upon with feelings of regard by all classes, and among Sudras they are even entitled to claim partition with the legitimate sons of their deceased father (*Thangam Pillai* v. *Suppa Pillai*(1)).

(1) I.L.R. 12 Mad., 401.

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SUBBA REDDI v. DORAISAMI BATHEN.

Again, though the general sentiment may be in favour of such a rule when there is no joint family property and the after-born son is wholly unprovided for in consequence of the will, can the Courts say whether there is a similar sentiment when the after-born son is well provided for by reason of the existence of joint family property, and when the will concerns comparatively unimportant items of self-acquired property bequeathed to the legatees, it may be, for special reasons. It would be easy, but it is not necessary, to multiply instances of the practical difficulties that would arise if the Courts attempted to act on any presumed intention of the testator, or any presumed general sentiment in favour of revocation arising from an alteration of circumstances after the making of the will.

The legislature having dealt with the question of the revocation of wills to which the Hindu Wills Act applies, and having enacted that no such will shall be revoked otherwise than in the manner provided in the Act, it is not open to the Courts to hold that such wills may be otherwise revoked. If that is the law with regard to wills to which the Hindu Wills Act applies, it must also be held to be the law with regard to other wills, for there is no reason for any difference in this respect between the two classes of wills, and any such difference would be highly inconvenient and illogical.

I would therefore dismiss the appeals with costs

MILLER, J.—I concur.

I think it is clear that, by the incorporation of section 57 of the Succession Act in the Hindu Wills Act and by the enactment of the provision of section 3 of the latter Act, the Indian legislature has declared that the principle underlying the rule of revocation by change of circumstances is not to be applied to the wills of Hindus.

If it could be said that by this legislation the Hindu Law of wills has been altered, we should, of course, have to apply the principle in question to wills unaffected by the alteration, but it was certainly not demonstrated in the argument before us that any established principle of Hindu testamentary law had been affected by the enactment of Act XXI of 1870 in the case of wills to which that Act applies.

This being so, we ought, in my view, not to introduce or attempt to establish a principle which the legislature, when

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dealing with the question of revocation, has not only deemed it either unnecessary or inadvisable to introduce or establish, but has actually excluded in the cases with which it has dealt.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Wallis.

1906. August 17. 1907. February 28. March 5.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF SOUTH CANARA (PLAINTIFF), PETITIONER,

v.

FERNANDES (DEFENDANT), RESPONDENT.*

Contract Act, Act IX of 1872, s. 69—Section applies only in cases where one person pays money which another is bound to pay—Payment must be to another person.

Section 69 of the Contract Act applies only where one person pays *to another* money which a third party is bound to pay.

Where Government, as mulgeni tenant pays to itself the assessment payable by the mulgar (landlord), it is not a payment by Government to another person, and the amount so paid or retained cannot be recovered from the mulgar under section 69 of the Contract Act.

Quære: Whether the Government can be held to have such an interest as will bring it within the section, as the sale to avert which the payment is made, can be brought about only by its own orders.

THE facts necessary for the purposes of the report are set out in the judgment.

The Government Pleader for petitioner.

K. P. Madhava Rau and *K. S. Ramaswami Sastri* for respondent.

JUDGMENT.—This is a suit of a somewhat peculiar nature brought apparently as a test case in which the Secretary of State for India in Council as representing Government sues to recover from a mulgar or landlord under whom Government holds certain land in South Canara as mulgaindar, or permanent tenant, assessment which it claims to have paid as tenant to prevent the land being sold for arrears of revenue. It is not a suit by Government to recover the amount of the assessment from the mulgar as

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* Civil Revision Petition No. 99 of 1906, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of Mr. C. D. J. Pinto, District Munsif of Mangalore, dated 10th October 1905, in Small Cause Suit No. 428 of 1905.

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THE SECRETARY OF STATE v. FERNANDES.

landholder and so liable to pay it under the Revenue Recovery Act, but is framed under section 69 of the Indian Contract Act. It is alleged that Government as mulgeni tenant under the mulgar was interested in the payment of the assessment which the mulgar was bound to pay, as if it was not paid, the land would have been liable to be sold by Government, and that Government as tenant having paid the assessment was entitled under section 69 of the Indian Contract Act to be reimbursed by the defendant as mulgar.

It is not disputed that Government occupies the position of mulgeni tenant under the mulgar, the result it is suggested of an escheat, but the lease on which it is entited to hold under the mulgar is not forthcoming. It appears, however, that the rent reserved is Rs. 1-12-0, and that out of this the mulgar paid the old assessment on the lands Re. 0-7-4. This assessment has now been increased to Rs. 1-14-0 which is in excess of the rent reserved by the mulgar, and the land is also subject to a village cess of Rs. 0-1-5, so that if these payments fall upon the mulgar, they eat up the whole benefit he derives from the holding and leave him liable for a further sum as well. In *Babshetti* v. *Venkataramana*(1) a case from North Canara it was held that the mulgar could not recover from the mulgeni tenant the amount of the increased assessment or village cess, and this decision was followed in *Ranga* v. *Suba Hegde*(2). So far as regards this question we cannot see any ground for distinguishing the present case or presuming as the respondent's vakil invited us to presume that in the lease which is not forthcoming there were terms which imposed upon the tenant the liability to bear any increase of assessment. The evidence is that the mulgar has always paid the assessment, and the presumption accordingly is that under the contract he was the person to pay it.

The District Munsif has not taken this ground in dismissing the plaintiff's suit, but rather the ground that Government has now registered the mulgeni tenant to whose rights it has succeeded as well as the mulgar as landholders and has issued a patta in their joint names. The effect of this in his opinion is to make them both liable to contribute to the payment of the assessment, and on this basis the Re. 0-7-4 which the mulgar has always paid would represent far more than his fair share, as nearly the whole

(1) I.L.R. 3 Bom., 154.

(2) I.L.R, 4 Bom., 473 at p. 477.

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beneficial interest in the land is vested in the mulgeni tenant. In *Ranga* v. *Subba Hegde*(1) the Court expressed a doubt whether notwithstanding a remark of Sir Thomas Munro's that Government can raise the rent of the mulgeni tenant when an additional assessment is imposed upon the mulgars, Government would have any power to vary the contract between the parties in this way. It appears equally open to doubt whether Government could by executive act impose on the mulgeni tenants any liability to pay assessment direct to Government so as to convert them into landholders within the definition in section 1 of the Revenue Recovery Act. Government do not claim any such right in the present case, but it is imputed to them by the District Munsif in answer to their case as stated in the plaint. We do not desire to express any opinion as to the existence of such a right without hearing the arguments which may be urged by Government in support of it, and it is unnecessary to do so, as the suit may be disposed of on another ground. In our opinion no suit will lie on the facts of the present case under section 69 of the Indian Contract Act. That section only applies when one person pays money which another is bound to pay. Payment in law means payment to another person, and here Government has not paid the sum in question to any one, but has retained it all along, merely transferring it from one pocket to another. Further as Government is alleged to have paid the assessment to avert the risk of the land being sold for arrears of revenue, and as such a sale could only take place under the orders of Government, we doubt if Government had any such interest in paying the assessment on behalf of the mulgar as to come within the section. In the result we affirm the decision of the District Munsif though for different reasons and dismiss the Civil Revision Petition with costs.

(1) I.L.R., 4 Bom., 473 at p. 477.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. February 21. March 5.

MRS. GOUDOIN (SECOND DEFENDANT), PETITIONER,

v.

VENCATESA MOODALLY (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, Act XIV of 1882, section 266, and Small Cause Court Rules 220—Attachment of married woman's property subject to restraint on anticipation—Section 10, Transfer of Property Act, Act IV of 1882—Section 8, Married Woman's Property Act, Act III of 1874—Property of married woman subject to restraint on anticipation not attachable in execution of a decree under section 8 of the Married Woman's Property Act.

The income of property belonging to a married woman subject to a restraint on anticipation, accruing due after the date of a decree against such married woman's separate property under section 8 of the Married Woman's Property Act, is not liable to attachment in execution of such decree under section 266 of the Code of Civil Procedure or under Rule 220 of the Rules of the Presidency Court of Small Causes.

Section 8 of the Married Woman's Property Act does not affect the doctrine of restraint on anticipation.

Hippolite v. *Stuart*, (I.L.R., 12 Calc., 522), dissented from.

In re Mantel and *Mantel*, (I.L.R., 18 Mad., 19), followed.

Section 10 of the Transfer of Property Act recognises and renders enforceable conditions in restraint of anticipation and is not affected by section 8 of the Married Woman's Property Act. A decree under section 8 of the latter Act against the separate property of a married woman cannot be considered as passed against property which she is restrained from anticipating.

Section 266 of the Code of Civil Procedure is only a rule of procedure, and is not exhaustive. It cannot be construed as authorising the attachment of property which, by the rule of substantive law embodied in section 10 of the Transfer of Property Act, is incapable of being transferred or charged by the beneficiary.

THE plaintiff obtained a decree in Small Cause Suit No. 15964 of 1904 on the file of the Presidency Small Cause Court against the first defendant and his wife the second defendant. By an ante-nuptial settlement certain Bank of Madras shares and Government securities, belonging to second defendant were transferred to the Official Trustee by second defendant, in trust, for carrying out the purposes specified therein. The income was payable to second

* Civil Revision petition No. 147 of 1906, presented under section 622 of the Code of Civil Procedure and section 15 of the Charter Act, praying the High Court to revise the judgment of the Full Bench of the Court of Small Causes at Madras, dated the 5th February 1906, in Small Cause Suit No. 15964 of 1904.

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defendant during her life and the deed provided that 'she shall not have power to dispose or deprive herself of the benefit thereof'. In execution, the plaintiff attached income in the hands of the Official Trustee which accrued due after the decree.

The further facts are stated in the judgment. The Registrar removed the attachment, but his order was set aside by the Full Bench of the Court of Small Causes.

The second defendant presented a revision petition to the High Court.

Mr. *Nugent Grant* for petitioner.

V. Visvanatha Sastri for respondent.

JUDGMENT.—In this case the plaintiff obtained a decree in the Court of Small Causes against a husband and wife on a promissory note signed by both for Rs. 882 and costs; but, as regards the wife, the decree directs that her liability is to be only to the extent of her separate property, if any. In execution of this decree the decree-holder attached interest in the hands of the Official Trustee, Madras, payable to the second defendant, the married woman, under a settlement by which she was restrained from anticipation. This interest had accrued due subsequent to the date of the judgment, and the question is whether the income of property, subject to a restraint upon anticipation accruing due after the date of the judgment, can be attached in execution of a decree against the separate property of a married woman. The Registrar, on the application of the second defendant, ordered the attachment to be removed, but the plaintiff applied for a new trial and the Full Bench of the Court eventually dimissed the application to remove the attachment. This is the order we are now asked to revise. The short ground on which the Full Bench proceeded was that the interest in question was property belonging to and at the disposal of the second defendant within the meaning of rule 220 of the Small Cause Court Rules which reproduces section 266 of the Code of Civil Procedure, and that it did not come within any of the exceptions contained in the rules. In our opinion, the case cannot be decided simply on a consideration of the terms of the rule authorising the attachment without regard to the terms of the decree, or the law in accordance with which the decree was passed in its present form.

The doctrine of restraint on anticipation established by Courts of Equity for the protection of married women during coverture is

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one which has always been recognized and enforced by Cour India; and in *Peters* v. *Manuk*(1), it was held that the provi in section 4 of the Indian Succession Act, 1865, that no one sho by marriage, become incapable of doing any act in respect of own property which she could have done if unmarried, must no read as in any way affecting the application of the princip With regard to the terms of section 8 of the Married Woman Property Act, 1874, under which the present decree against t separate property of the second defendant has been passed, th Calcutta High Court in *Hippolite* v. *Stuart*(2) held that th terms of the section authorised judgment to be given even again separate property which was subject to a restraint upon antic pation, but Farran, J., in *Cursetji Pestonji Tarachand* v. *Rusto Dossabhoy and others*(3) dissented from the reasons given f this decision, and Shephard, J., in *In re Mantel* and *Mantel*(4) o a full consideration of the whole question declined to follow i With great deference for the high authority of the judges wh took part in the decision in *Hippolite* v. *Stuart*(2) we feel co strained to follow the judgment of Shephard, J., and to hold th section 8 of the Married Woman's Property Act was not intende to affect the operation of the doctrine of restraint upon anticip tion by rendering such property liable on contracts made by h as to her separate estate. However this may be, the question now, in our opinion, conclusively settled by the terms of section 1 of the Transfer of Property Act, 1882, which gives statutory effe to the doctrine. As explained by Sir George Jessel in *In Ridley Buckton* v. *Hay*(5) restraint on anticipation is only restraint on alienation, and is an exception established by equit in favour of married women to the general rule of law whic regards conditions in transfers of property restraining alienatio as null and void. This general rule is embodied in the first pa of section 10 of the Transfer of Property Act, while the exceptio in favour of married women appears in the proviso.

If, then, the condition in restraint of anticipation is recognize and enforceable in India, and if its operation is not affected b section 8 of the Married Woman's Property Act, it follows, w think, that decrees such as this passed in accordance with th

(1) 13 B.L.R., 383. (2) I.L.R., 12 Calc., 522.
(3) I.L.R., 11 Bom., 348. (4) I.L.R., 18 Mad., 19.
(5) L.R., 11 Ch.D., 645.

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section against the separate property, if any, of a married woman in respect of a contract entered into by her, cannot be considered as passed against property which she is restrained from anticipating. To hold otherwise, as has often been pointed out, and most recently by Lord Macnaghten in *Bolitho & Co. Limited* v. *Gidley*(1) would render the restraint upon anticipation absolutely inoperative. In *Hood Barrs* v. *Cathcart*(2), the Court of Appeal held that the income of property subject to restraint upon anticipation which accrued due before judgment was not liable to attachment, but this decision was overruled by the House of Lords in *Hood Barrs* v. *Heriot*(3). The decision of the House of Lords did not affect the income accrued due after judgment. (*Whiteley* v. *Edwards*(4) and *Bolitho & Co. Limited* v. *Gidley*(1).)

That such income was exempt from attachment had been decided some years before in *Chapman* v. *Biggs*(5) with special reference to the terms of Order XLV, Rule 1 (Order governing the attachments), which does not contain any express exemption in favour of property subject to a restraint upon anticipation.

Coming now to Rule 220 (section 266 of the Civil Procedure Code), it is only a rule of procedure and the exceptions mentioned in the proviso are not stated in terms to be exhaustive. Such a rule cannot, we think, be read as authorising the attachment of property which, by a rule of substantive law now embodied in section 10 of the Transfer of Property Act, is incapable of being transferred or charged by the beneficiary. A judgment, such as this, against the separate property of a married woman under section 8 of the Married Woman's Property Act, 1874, must, we think be read as confined to property which is not subject to the restraint upon anticipation, and, if so, its operation cannot be extended by rule 112.

For these reasons we must set aside the order of the Full Bench and direct the attachment to be raised, and any monies paid by the Official Trustee to the decree-holder to be refunded to the Official Trustee.

Messrs. *Short & Bewes*—attorneys for petitioner.

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(1) L.R., (1905), A.C., 98.
(2) L.R., (1894), 2 Q.B., 559.
(3) L.R., (1896), A.C., 174.
(4) L.R., (1896), 2 Q.B., 48.
(5) 11 Q.B.D., 27.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

1907. February 22, 27. March 18, 25.

MUTHUSWAMI MUDALI (PETITIONER), PETITIONER,

v.

VEENI CHETTI AND ANOTHER (COUNTER-PETITIONER), RESPONDENTS *

Criminal Procedure, Act V of 1898, s. 195 (6)—Appeal lies to High Court against an appellate order revoking sanction granted by Court of First Instance.

The right of appeal conferred by section 195 (6) of the Code of Criminal Procedure as read with sub-section (7) of the same section, is not restricted to a right of appeal to the Appellate Court to which the Court of First Instance is immediately subordinate.

The revocation by the Appellate Court of a sanction given by the Court of First Instance, is a refusal of sanction within the meaning of sub-section (6) and an appeal lies therefrom to the High Court, as well as in cases where the sanction refused by the Court of First Instance is granted by the Appellate Court.

Palaniappa Chetti v. *Annamalai Chetti*, (I.L.R., 27 Mad., 223), approved.

An order revoking a sanction is a refusal of a sanction just as an order confirming a sanction is an order giving a sanction.

THE facts necessary for the purposes of this report are set out by (Benson and Wallis, JJ.) in the Order of Reference to the Full Bench which is as follows :—

BENSON, J.—In this case the District Munsif granted sanction under section 195 of the Criminal Procedure Code for the prosecution of certain persons for offences specified in the order.

The District Judge on appeal revoked the sanction on the merits.

The party in whose favour the sanction was originally granted now petitions the High Court to set aside the District Judge's order of revocation and to re-grant the sanction.

The respondents contend that the High Court has no power to do this. They rely on the case of *Hamijuddi Mondol* v. *Damodar*

* Civil Miscellaneous Petition No. 1468 of 1906, presented under section 195 of the Code of Criminal Procedure, praying the High Court to revise the order of M.R.Ry. S. Gopalachariar, District Judge of Salem, dated 26th July 1906, in Original Petition No. 25 of 1906, revoking the sanction for prosecution of the respondents accorded by the District Munsif of Namakkal in I.A. No. 308 of 1906.

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Ghose(1), in which the facts were similar to those in the present case, and in which it was held that the High Court had no power to interfere under section 195, sub-section (6) of the Criminal Procedure Code "as the order of the District Judge was not one granting or refusing sanction, but one revoking sanction," or under section 622 of the Civil Procedure Code as the District Judge revoked the sanction on the merits and in the exercise of a jurisdiction vested in him by law.

I should have been prepared to follow this decision as being in accordance with the language of section 195, sub-section (6), but that a contrary view has been expressed in the case of *Palaniappa Chetti* v. *Annamalai Chetti*(2). That was a case in which the District Judge granted a sanction which had been refused by the Subordinate Judge, and so the exact question now before us did not arise for decision in that case, and we are not bound by the expression of opinion in regard to such a case as that before us, but in view of the importance of the question raised, I think it advisable to refer for the decision of the Full Bench the question raised before us, as stated above.

The case of *Kannambath Imbichi Nair* v. *Manathanath Ramar Nair*(3), was also referred to, but in that case also the question before the Court can be distinguished from the present case.

WALLIS, J.—I concur and should be glad to see the wider question whether any further appeal is allowable from an order under section 195 (6) of the Criminal Procedure Code made by a Court on appeal from a Court subordinate to itself considered by a Full Bench, as it is not clear that all the aspects of this question were considered in *Palaniappa Chetti* v. *Annamalai Chetti*(2). The wording of section 195 (6) is necessarily general as it has to provide for cases in which applications for sanction are made to public servants as well as to Courts, and also for cases in which the application for sanction is made not to the Court in, or in relation to, which the offence is alleged to have been committed, but to the Court to which such last mentioned Court is subordinate. The sub-section clearly gives one appeal, but does not say—and it can hardly, I think, be implied—that it was intended to allow more than one appeal in each case. Only one appeal is given if the words

(1) 10 C.W.N., 1026. (2) I.L.R., 27 Mad., 223.
(3) I.L.R., 29 Mad., 122.

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MUTHUSWAMI MUDALI v. VEENI CHETTI.

"any sanction given or refused under the section" be read as meaning given or refused in the first instance, and to construe the sub-section in this way would appear to be in accordance with the principle that statutes creating new jurisdiction must be strictly construed. This construction is also supported by the language of sub-section(7) which provides that for the purposes of the section every Court shall be deemed to be subordinate *only* to the Court to which appeals from such Court ordinarily lie. To allow a further appeal is in effect to make the Court to which the application is originally made subordinate also to the Court to which the further appeal lies. The well known policy of the Legislature embodied in its Codes is not to allow more than one appeal on a question of fact either in civil or criminal cases, and it can never have been intended to allow a second appeal in a proceeding which is only a statutory preliminary to the institution of criminal proceedings in certain cases designed to prevent an abuse of the criminal law. The other view involves, not only a second, but even a third appeal, in cases where the application is originally made to a Magistrate, who according to the test in sub-section 7, is subordinate to the District Magistrate, who is subordinate to the Sessions Judge, who again is subordinate to the High Court. Such an intention should not, it seems to me, be attributed to the Legislature unless the language of the section is incapable of any other interpretation.

The case came on for hearing in due course before the Full Bench constituted as above.

K. R. Subrahmania Sastri for petitioner.

Dr. *S. Swaminathen* for respondents.

The Court expressed the following

OPINION.—We are of opinion that the right of appeal conferred by section 195 (6) of the Code of Criminal Procedure as read with sub-section (7) of the same section is not restricted to a right of appeal to the Appellate Court to which the Court of First Instance is immediately subordinate. We think the case of *Palaniappa Chetti* v. *Annamalai Chetti*(1) was rightly decided, and that an appeal lies to the High Court not only in cases where the Court of First Instance refuses sanction and sanction is granted by the Court to which that Court is immediately subordinate, but also in

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(1) I.L.R., 27 Mad., 223.

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cases where the Court of First Instance grants sanction and the sanction is revoked by the Court to which that Court is immediately subordinate.

It is clear from the cases (*Habibar Rahaman* v. *Khoda Bux* and *Girija Sankar Roy* v. *Benode Sheikh*(1)) to which our attention has been called, that the decision in the case of *Hamijuddi Mondol* v. *Damodar Ghose*(2) which is referred to in the Order of Reference, rested upon the ground that an order revoking a sanction to prosecute was not a refusal of a sanction within the meaning of sub-section (6). We are of opinion that a revocation of a sanction is a refusal of a sanction in the same way as an order confirming a grant of a sanction is a giving of a sanction for the purposes of the section.

We hold that, in the circumstances of this case, an appeal lies to this Court.

The case came on for final hearing before (Benson and Wallis, JJ.) when the Court delivered the following

JUDGMENT.—The Full Bench has decided that an appeal lies in this case. We have, therefore, heard the appeal argued.

The accused was certainly wrong in cutting and removing to the thrashing floor a portion of the crop after it had been, to his knowledge, attached.

But the Judge has found that he offered the receiver appointed by the Court to abstain from further cutting of the crop, and to hand over to him the whole of the crop already cut.

In these circumstances we do not consider it necessary in the interest of justice to sanction his prosecution.

We therefore dismiss the petition.

(1) 5 C.L.J., 219 and 222.

(2) 10 C.W.N., 1026.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

1907. January 18, 21. February 5.

THAJI BEEBI AND OTHERS (PLAINTIFFS AND LEGAL REPRESENTATIVE OF THE FIRST PLAINTIFF), APPELLANTS,

v.

TIRUMALAIAPPA PILLAI AND OTHERS (DEFENDANTS AND FIFTH DEFENDANT'S LEGAL REPRESENTATIVE), RESPONDENTS.*

Stamp Act, Act I of 1879, s. 35—No secondary evidence admissible the receiving which will be to give some effect to an unstamped document.

In a suit by plaintiffs to redeem lands alleged to have been mortgaged under an unstamped instrument in 1841, the document was not produced and therefore secondary evidence was not receivable to prove the contents of the document. The plaintiff sought to rely on the oral evidence as to execution of the document and the passing of possession under the deed as showing that the defendant by such possession acquired only a mortgagee's right in the property:

Held, that the receiving of such evidence will be to give some effect to the unstamped document by connecting the possession with the contents thereof, and was therefore contrary to the provisions of section 35 of the Indian Stamp Act. An admission of the mortgage by the defendants' ancestor was also held not receivable on the same grounds.

Chenbasapa v. *Lakshmanan Ramchandra*, (I.L.R., 18 Bom., 369), referred to.

SUIT for redemption of lands.

The plaintiffs' case was that the lands were mortgaged with possession to the ancestor of first defendant by the ancestors of plaintiffs in 1841, for five years. The first defendant denied the mortgage and alleged that plaintiffs' ancestors had sold the lands to his ancestors in 1843, and that his ancestors, and he after them had been enjoying the property as owners.

Plaintiffs alleged that the cadjan mortgage deed was in the possession of first defendant who was asked to produce it. First defendant denied the existence of any such deed.

Plaintiff examined two witnesses to prove the mortgage, one of whom stated that he attested the cadjan document which he said was unstamped. Oral evidence was let in by plaintiffs to prove the said mortgage, and they also put in a petition by the first defendant's

* Second Appeal No. 2476 of 1903, presented against the decree of W. W. Phillips, Esq., District Judge of Tinnevelly, in Appeal Suit No. 220 of 1902, presented against the decree of M.R.Ry. M. R. Narayanaswami Ayyar, District Munsif of Ambasamudram, in Original Suit No. 33 of 1901.

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ancestor in which the mortgage was admitted. No objection was taken by the defendants to the reception of the secondary evidence. The Munsif found the plaint mortgage, as well as the sale set up by first defendant proved and dismissed the suit. On appeal, the District Judge upheld the decision on the ground that the lower Court ought not to have received secondary evidence of the mortgage, and that the plaintiffs' suit based on a document which was not produced and of which no secondary evidence was admissible, must fail.

Plaintiffs appealed to the High Court.

P. R. Sundara Ayyar and *K. S. Ramasamy Sastri* for second to fourteenth appellants.

The Hon. Mr. *P. S. Sivaswami Ayyar* and *V. Purushothama Ayyar* for first, third, fourth, sixth and seventh respondents.

JUDGMENT.—The District Judge found upon the evidence as it was competent for him to do, that the mortgage instrument relied on by the plaintiffs had been executed on an unstamped cadjan.

The same not being forthcoming at the trial so as to admit of penalty being levied thereon, secondary evidence of its contents was not receivable.

Is it then open to the plaintiff to rely on the oral evidence as to the alleged execution of the instrument and the alleged passing of possession of the property under that instrument, in order to show that that possession operated to create by prescription only the title of a mortgagee in the defendants? This question must be answered in the negative. To hold otherwise would be to give some effect to the unstamped instrument inasmuch as it would necessarily connect the possession with the contents of the document relating thereto; and that would be contrary to the express provision of section 35 of the Stamp Act which lays down that an instrument chargeable with duty shall not only not be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, but also that it shall not be "acted upon" by any such person unless duly stamped (*Chenbasapa* v. *Lakshmanan Ramchandra*(1)). It may be added that in Phipson on 'Evidence' it is pointed out with reference to the corresponding provision of the English Act, that, unlike an invalid instrument which is receivable for collateral

(1) I.L.R., 18 Bom., 369.

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purposes, an unstamped document is admissible for no purp whatever save in criminal cases, an exception which finds a pl in our Act also (Phipson, 3rd edition, page 197).

As regards the statement filed by the defendants' ancestor bef the Inam Deputy Collector there is no doubt a recital there of mortgage, though coupled with another, that the mortgage was an unstamped cadjan. If that admission is to be taken, as it w taken by the District Munsif as referring to the transaction intend to be evidenced by the unstamped document relied on by th plaintiffs, the admission would be secondary evidence inadmissib for reasons already stated. If, on the other hand, it is to be tak as referring to a different mortgage inasmuch as the date there is stated to be 1841 while the date given in the plaint is 1842, ev then the result would be the same having regard to the fact th that also, was on an unstamped cadjan not produced.

The second appeal therefore fails and is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1907. February 5, 22.

KADAKAMVALLI SANKARAN MUSSAD (SECOND DEFENDANT), APPELLANT,

v.

MOKKATH USSAIN HAJI AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Malabar law—Otti-holder's right of pre-emption, nature of—Such right, a ri election and not a right to veto—Right of pre-emption cannot be enforce counter-claim by otti-holder in transferee's suit for redemption—Variati between pleading and proof—Plaintiff failing to prove plaint mortgage may given a decree on mortgage admitted by defendant.

The right of pre-emption which an otti-holder has by custom under Malaba law is only a right to elect whether he will purchase or not, and not a right to veto a transfer by the janmi, without his knowledge.

The otti-holder's right cannot be pleaded as a bar to a transferee's right to redeem, without an offer to purchase that right.

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* Second Appeal No. 1102 of 1904, presented against the decree of M.R.Ry. K. Krishna Row, Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 647 of 1903, presented against the decree of M.R.Ry. T. V. Anantan Nair, Principal District Munsif of Calicut, in Original Suit No. 138 of 1903.

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Such an offer by the otti-holder cannot, in this country, be entertained as a counter-claim in a suit by the transferee of the janmi right for redemption, but must be enforced by a separate suit.

Kurri Veerareddi v. *Kurri Bapireddi*, (I.L.R., 29 Mad., 339), followed.

Case law on the otti-holder's right of pre-emption discussed.

Where in a suit for redemption, the plaintiff fails to prove the mortgage set up by him, the Court may allow the plaintiff to redeem on the basis of a different mortgage, under which the defendant claims to hold.

SUIT to redeem a paramba alleged to have been demised on a kanam of Rs. 1-4-0 by Aramprath Illat Vasudevan Musad to the first defendant's father in 1037 (1861-62).

The paramba belonged in janm to the Arampratb illam, and was purchased by the plaintiff at a Court sale in execution of a decree passed against the illam.

Second defendant stated that the paramba was obtained by his late brother from the Arampratb illam on otti in 1037 (1861-62), and has been in the possession of his kanam tenant, the first defendant, and that the suit was barred by adverse possession.

The District Munsif disbelieved the kanam set up by the plaintiff as well as the otti pleaded by the second defendant, but he dismissed the suit as barred by limitation.

On appeal, the Subordinate Judge held that the kanam set up by plaintiff and the otti set up by second defendant were not proved. He held, however, that the plaintiff was entitled to redeem on the basis of the otti mortgage under which the second defendant claimed to hold and decreed accordingly.

The second defendant appealed to the High Court.

K. P. Govinda Menon for appellant.

V. Ryru Nambiar for first respondent.

JUDGMENT.—The plaintiff, as the purchaser at a Court auction of the rights of the Arampratb illam in the paramba in suit, sued to redeem a kanam alleged to have been granted by the illam to the first defendant, and impleaded the second defendant as being in possession though without any valid title.

The first defendant did not appear, and the second defendant set up an otti mortgage from the plaintiff's predecessors in interest, the Arampratb illam.

The Courts below have found that the kanam which the plaintiff sought to redeem was not proved, and that the instrument set up by the second defendant as proof of his otti mortgage was not genuine. The Court of First Instance dismissed

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the suit, but the lower Appellate Court has given the plaintiff a decree for redemption of an otti in the terms of that set up by the second defendant, on the second defendant's admission that he held on that tenure.

The appeal against this decree is on two grounds: (1) That the plaintiff having failed to prove the mortgage set up by himself should not have been given a decree against the second defendant, and (2) that the second defendant as holding a mortgage in the otti form has a right of pre-emption which bars the plaintiff's right to redeem.

On the first point we have no doubt that the plaintiff was properly allowed to redeem the mortgage alleged by the second defendant to constitute the title on which he held possession. He has not alleged that he has acquired a title by possession adverse to the janmi, and as the plaintiff was willing to redeem on the footing of the otti set up by the second defendant, though it was found that the document on which he relied was not proved, there is no difficulty in arriving at the conditions of redemption and framing a decree.

The second point is not discussed in the judgments of either of the lower Courts and was not the subject of an issue, though it was taken in paragraph 5 of the second defendant's written statement where he says "No other person than this defendant who is the ottidar has the right to obtain the janmam of the plaint paramba."

The District Munsif found no occasion to decide the question as he treated the alleged otti mortgage as non-existent, and there is nothing to show that the second defendant put the contention forward in the lower Appellate Court.

He has however in his appeal to this Court repeated his contention in a somewhat modified form and we must deal with it. The nature of an ottidar's right of pre-emption was considered in the Sudder Court in 1857 on an appeal from a decision of Mr. Holloway, no mean authority on the customs of Malabar, who was at that time Subordinate Judge of Calicut.

Mr. Holloway held that "until the refusal of the otti-holder to purchase, to no other purchaser could the janm right by the custom of Malabar be sold."

This dictum may be interpreted in more ways than one but Mr. Holloway's meaning is made clear by the decree which he passed, which declared that the janm right had passed to the

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plaintiff (a transferee of the janmi with notice of the otti and enjoined the plaintiff to transfer it to the otti-holder on receipt within a fixed time, of a fixed sum of money.

The right of the otti-holder was therefore in Mr. Holloway's view a true right of pre-emption, a right to elect whether the holder would or would not become the purchaser.

The learned Judges of the Sudder Court did not dispute the correctness of this view, in fact their decision shows that they accepted it, but they observed that the janmi having parted with his unfettered right of sale and retained only a conditional right to sell on the otti-holder's refusal to purchase at a certain fixed amount, his sale to a third party was an infraction of his contract with the otti-holder, and was consequently invalid.

They explained the effect of their decision to be that the janm right remained in the plaintiff's transferor who could at any time call on the otti-holder to purchase it at the proper price and in the event of his refusal could sell it to whom he pleased; and they remarked that Mr. Holloway's decree was too favourable to the ottidar in that it gave him time in which to make his election, whereas by the custom of Malabar he could be called on by the janmi to make it at once. They set aside that portion of the decree which declared the plaintiff the owner of the janm right and enjoined him to transfer it to the otti-holder. (Sudder decisions, 1857, page 121.) By this decision the learned Judges allowed the ottidar to avoid the sale without offering to become the purchaser. Because the sale had been made behind his back they converted his right from a right of election to a right of veto. It would seem that in order to give full effect to the right of pre-emption and to preserve at the same time the custom as the Court conceived it, all that was necessary was to shorten the period allowed by Mr. Holloway for payment by the otti-holder of the price; and that by the Sudder Court's decision the otti-holder obtained a right which the custom did not give him.

The subsequent cases in which the same view was adopted and in which the otti-holder was allowed to resist redemption by a transferee of the janm title seem to be open to the same objection (*Cheria Krishnan* v. *Vishnu*(1), *Ambu* v. *Raman*(2) and *Kanharan-kutti* v. *Uthotti*(3)).

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(1) I.L.R., 5 Mad., 198. (2) I.L.R., 9 Mad., 371.
(3) I.L.R., 13 Mad., 490.

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On the other hand, the cases (*Vasudevan* v. *Keshavan*(1), *Ukku* v. *Kutti*(2) and *Krishna Menon* v. *Kesavan*(3)) give full effect to the right of pre-emption without converting it into a right of a different character.

In our opinion the otti-holder's right cannot be pleaded as a bar to the plaintiff's right to redeem without an offer to purchase that right. The second defendant has not even now offered to do this and we do not think that even if he did so we could give effect to his offer in this suit. Sir Bhashyam Ayyangar in *Ramasami Pattar* v. *Chinnan Asari*(4) has pointed out that the decree in *Ukku* v. *Kutti*(2) gives relief to the otti-holder as if in a cross suit, and he suggests that that may be an irregular way of dealing with a suit for redemption (*vide* at page 465 of the report) and since that case a Full Bench of this Court has held that such counter-claims cannot be entertained in this country (*Kurri Veerareddi* v. *Kurri Bapireddi*(5)).

Whatever be the real nature of the ottidar's right, whether it is based on the acquisition of an interest in the equity of redemption or not, it has nothing to do with that portion of the janm right which is mortgaged to the otti-holder; it follows that if it is to be enforced in this suit it can only be enforced by way of a counter-claim and, we cannot, having regard to the Full Bench decision, enforce it in that way.

If a suit is not yet barred by limitation it may still be open to the otti-holder to enforce his right of pre-emption.

The second appeal is dismissed with costs.

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(1) I L.R., 7 Mad., 309.
(2) I.L.R., 15 Mad., 401.
(3) I.L.R., 20 Mad., 305.
(4) I.L.R., 24 Mad., 449 at p. 465.
(5) I.L.R., 29 Mad., 339.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

MADUGULA LATCHIAH AND ANOTHER (FIRST AND SECOND DEFENDANTS), APPELLANTS,

1907.
February 12.
March 4.

v.

PALLY MUKKALINGA AND OTHERS (PLAINTIFF AND THIRD, FOURTH AND FIFTH DEFENDANTS), RESPONDENTS.*

Limitation Act, Act XV of 1877, *s.* 28, *sch. II, art.* 44—'*Sale' in art.* 44 *not confined to transfer of absolute ownership only—Finding in previous suit of the invalidity of a sale does not dispense with the necessity of suing to set aside such sale.*

The term 'sale' in article 44 of schedule II of the Limitation Act is not confined to an assignment of absolute ownership only but means an assignment for a price of the ward's interest whatever that may be. Article 44 will therefore apply to a suit by the ward to set aside an assignment by his guardian of his right as mortgagee.

Gnanasambhanda Pandara Sannadhi v. *Velu Pandaram*, (I.L.R., 23 Mad. 279), referred to and followed.

A suit by a ward to recover properties improperly alienated by the guardian will be governed by article 44 and the period of limitation will not be that prescribed for a suit for possession of immoveable property. The fact that in a previous suit by the alienee against the ward, to recover some properties which had not passed to his possession under the transfer, the alienation was found invalid will not relieve the ward from the consequences of his failure to have the transfer set aside within the period allowed by law with regard to properties which had passed to the possession of the alienee. When at the time such previous suit was brought, the ward's right to such property had been extinguished under section 28 of the Limitation Act, the decision will not have the effect of reviving the extinguished right.

Lakshmi Doss v. *Roop Laul*, (I.L.R., 30 Mad., 169), distinguished.

SUIT to recover land with mesne profits.

Plaintiff's case was that the suit lands were mortgaged with possession by their owner in favour of the plaintiff's mother; that, during his minority, his mother brought a suit upon the mortgage and, in accordance with a rajeenama filed therein, obtained a decree for possession of the mortgaged lands on the 19th July

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* Second Appeal No. 1188 of 1904, presented against the decree of W. B. Ayling, Esq., District Judge of Ganjam, in Appeal Suit No. 28 of 1904, presented against the decree of M.R.Ry. V. Bhashyam Ayyangar, District Munsif of Chicacole, in Original Suit No. 513 of 1902.

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MADUGULA LATCHIAH v. PALLY MUKKALINGA.

1890; that he subsequently learnt that his mother on the 23rd February 1892 (he being still a minor) transferred the rights of the plaintiff under the said decree to first defendant in consideration of Rs. 100; that the defendant brought a suit against the plaintiff for the recovery of part of the lands comprised in the decree and that the said suit was dismissed on the ground that the assignment was invalid.

Defendants Nos. 1 and 2 pleaded *inter alia* that the suit was barred as it had not brought within three years of plaintiff's attaining majority.

The District Munsif held that the suit was barred by limitation and dismissed the suit.

On appeal the District Judge reversed the decree holding that article 144 of schedule II of the Limitation Act applied to the case, and that the suit being brought within twelve years of dispossession was within time.

First and second defendants appealed.

P. R. Sundara Ayyar for appellants.

V. Krishnaswami Ayyar for first respondent.

JUDGMENT.—The plaintiff in this case was entitled to a sum of money under a mortgage. During his minority his mother and guardian as his next friend brought a suit upon the mortgage against the mortgagor and, by consent, obtained on the 19th July 1890 a decree for possession of the mortgaged lands. Thereupon on the 23rd February 1892 the guardian executed exhibit II transferring the right of the plaintiff under the decree to the first defendant in consideration of Rs. 100, the plaintiff being then still a minor. The first defendant brought Original Suit No. 115 of 1902 for the recovery from the plaintiff of part of the lands comprised in the decree which the guardian purported to transfer to the defendant as already stated. That suit was dismissed, the Court finding that the assignment by the guardian was invalid on the ground that the consideration therefor was not such as to justify the transfer of the plaintiff's interest by the guardian, and also on the ground that the assignment was without the permission of the Court, and, therefore, contrary to section 462 of the Code of Civil Procedure. The suit out of which the present appeal arises was thereupon instituted by the plaintiff for possession of lands which though comprised in the decree in favour of the plaintiff obtained by his mother did not form part of the property to which

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MADUGULA LATCHIAH v. PALLY MUKKALINGA.

the suit by the first defendant against the plaintiff related. The institution of the present suit took place long after the expiry of three years from the time the plaintiff attained his majority, though within twelve years from the time when the plaintiff became entitled to possession from the mortgagor—judgment-debtor under the decree of 1890 and necessarily so from the time when the first defendant got into possession in execution of the decree purporting to have been assigned to him by the guardian. The lower Appellate Court decreed the suit.

On behalf of the defendant it was urged before us that the suit was governed by article 44 of the second schedule of the Indian Limitation Act XV of 1877 and having been brought more than three years after the plaintiff attained his majority, the suit should have been dismissed and the observations of the Judical Committee in *Gnanasambhanda Pandara Sannadhi* v. *Velu Pandaram*(1) with reference to the article referred to were relied on. The applicability of the article, of course, depends upon whether the transfer by the plaintiff's mother to the defendant was a 'sale' within the meaning of the article. No doubt, under the decree of 1890, the plaintiff became entitled to the possession of the lands in dispute together with other lands. But there is nothing in the language thereof which would warrant the view that the possession was to be more than that of a mortgagee, and having regard to the decision of the Judicial Committee in *Sri Raja Papamma Rao* v. *Sri Vira Pratapa H. V. Ramachandra Razu*(2), the right created by the terms of that decree in favour of the plaintiff cannot, in our opinion, be held to amount to that of an owner. The transfer, therefore, by the mother was a transfer of the plaintiff's interest as mortgagee and not a transfer of ownership. If the term 'sale' in the article relied on be understood as used to cover an assignment for a price of the ward's interest whatever that be and not merely a sale in the sense in which it is used in the Indian Contract Act, section 77, or the Transfer of Property Act, section 54, then it would follow that the transfer here by the mother would fall within the article. If, on the other hand, 'sale' be understood as intended to refer to transfers of ownership only, the article will not apply. Our attention has not been called to any decisions on the point. It

(1) I.L.R., 23 Mad., 279. (2) I.L.R., 19 Mad., 250.

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MADUGULA LATCHIAH v. PALLY MUKKALINGA.

seems to us that the word should be taken as used in the former sense. The term occurs in numerous other articles in the second schedule to the Indian Limitation Act, viz., articles 10, 12, 111, 136, 137, 138, 147, 165, 166, 167 and 172. Probably in articles 10 and 136 the transfer intended is that of ownership, but in all the other provisions it obviously includes a transfer for a price without reference to whether the interest amounts to ownership. As in article 44 there is nothing to restrict the more general meaning in which the word is used in the numerous parts of the schedule just referred to, the right construction of the article seems to be what we have stated above. The suggestion made in Stokes' 'Anglo-Indian Code,' vol. II, page 950, by the learned editor that the article should be extended to mortgages and leases, of course, implies that he understood the term in question as used in the sense of a complete assignment of the ward's interest in contradistinction to something carved out of such interest as by way of mortgage or lease.

In this view, following the opinion of the Judicial Committee cited for the defendant, it must, we think, be held that the plaintiff's suit fails on the ground that, long before its institution, his right to the property in question had become extinguished by the operation of article 44 and section 28 of the Indian Limitation Act.

On behalf of the plaintiff it was, however, urged that the finding in the previous suit that the transfer by the mother was invalid, rendered it superfluous for the plaintiff to seek to set it aside, and that the present suit should be viewed as one for possession maintainable by him without his having to displace an invalid sale as a preliminary to such possession. But this argument overlooks a vital distinction between the two litigations. No doubt as held by the Full Bench in the case of *Lakshmi Doss* v. *Roop Laul*(1) it was competent to the plaintiff to defend, in the previous suit, his right to the lands in his possession by relying on the invalidity of the transfer, notwithstanding he had not sued to set it aside within three years from the time he attained his majority. But a finding with reference to such a defence though necessary for the purposes of that litigation cannot operate to relieve the plaintiff from the

(1) I.L.R., 30 Mad., 169.

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consequences of his failure to have the transfer set aside within the time limited by law in regard to property of which possession had passed to the defendant under the transfer. As the plaintiff's title to such property had become extinguished prior to the institution of the previous suit by the defendant, and *a fortiori* before the contention of the present plaintiff then came to be tried, it cannot be revived by any such subsequent adjudication in his favour with reference to the validity of the transfer in a litigation connected with other properties.

We, therefore, allow the appeal, reverse the decree of the lower Appellate Court and restore that of the District Munsif with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1907.
February 27.
March 5.

KARUPPA GOUNDAN *alias* THOPPALA GOUNDAN HAVING DIED, HIS SON AND LEGAL REPRESENTATIVE VEDIAPPA GOUNDAN BEING MINOR BY HIS MATERNAL UNCLE AND GUARDIAN VENKATACHALA GOUNDAN (PLAINTIFF AND LEGAL REPRESENTATIVE), APPELLANT,

v.

PERIATHAMBI GOUNDAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Evidence Act, Act I of 1872, *ss.* 91, 95, 97—*Where sale deed gives wrong survey numbers to the lands sold, evidence admissible to show the real lands intended to be sold.*

The general rule laid down in section 91 of the Evidence Act is subject to the exceptions laid down in sections 95 and 97 of the same Act.

Where a sale deed describes the land sold by wrong survey numbers, extrinsic evidence is admissible to show that the lands intended to be sold and actually sold and delivered were lands bearing different survey numbers.

THE facts necessary for the purposes of the report are fully stated in the judgment.

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* Second Appeal No. 1187 of 1904, presented against the decree of A. C. Tate, Esq., District Judge of South Arcot, in Appeal Suit No. 126 of 1903, presented against the decree of M.R.Ry. P. Audinarayaniah, District Munsif of Tirukkoyilur, in Original Suit No. 777 of 1902.

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KARUPPA GOUNDAN *alias* THOPPALA GOUNDAN *v.* PERIATHAMBI GOUNDAN.

K. R. Subrahmania Sastri for appellant.

T. Ramachandra Rau for third respondent.

JUDGMENT.—In 1902 the third defendant attached certain land as the property of the second defendant against whom he had a decree, and purchased it in Court auction. The land consists of survey No. 202 F, measuring 1·83 acres, assessed at Rs. 1–6–0 and No. 202 G, measuring 6·86 acres, assessed at Rs. 5–2–0.

The plaintiff is in possession of the land having bought it under exhibit A in 1901 from the second defendant who had purchased it in 1896 from the first defendant under exhibit B. In exhibits A and B, however, the land is described as survey Nos. 202 A and C instead of 202 F and G. The plaintiff sued to set aside the attachment and sale brought about by the third defendant on the ground that the second defendant had no interest in the property when it was attached. He also asked leave of the Original Court to amend the plaint by adding a prayer for the rectification of exhibit A by inserting the correct survey letters.

Both the Courts below dismissed the plaintiff's suit on the ground that his title-deed referred to survey Nos. 202 A and C and that, under section 91 of the Evidence Act, he could not adduce evidence to show that what was really conveyed to him was survey Nos. F and G. They therefore dismissed his suit, and it is against this dismissal that the plaintiff now appeals. We think that the decision of the Courts below is wrong. There is no doubt or contest as to the identity of the land. In the plaintiff's title-deeds it is described by its extent, and assessment and the name of the registered puttahdar. All these particulars show that the lands sold are those entered in the survey register as Nos. 202 F and G, not A and C. Survey No. 202 A is, in fact, Government forest land measuring 1,143 acres, while No. 202 C is land belonging to another puttahdar unconnected with the suit, and differing in extent and assessment from either of the lands now in dispute. The reference to the letters A and C in the plaintiff's title-deeds is a misdescription of the land, but the other particulars given in regard to it describe it correctly, so that there is no doubt as to its identity. When this is so, the misdescription in the document may be disregarded and does not render it useless as a document of title.

The general rule laid down in section 91 of the Indian Evidence Act no doubt is that when the terms of a contract have

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KARUPPA GOUNDAN *alias* THOPPALA GOUNDAN *v.* PERIATHAMBI GOUNDAN.

been reduced to writing, no evidence shall be given in proof of the terms of the contract (except the document itself (or secondary evidence of its contents in certain cases). But sections 95 and 97 contain important exceptions to this general rule. The illustration to section 95 shows that if A sells to B "my house in Calcutta," and if A has no house in Calcutta but has a house in Howrah, of which B has been in possession since the execution of the deed, these facts may be proved to show that the deed related to the house in Howrah.

So the illustration to section 97 shows that if A agrees to sell to B "my land at X in the occupation of Y" and A has land at X but not in the occupation of Y, and has land in the occupation of Y but it is not at X, evidence may be given to show which was intended to be sold. Another common case is where land within certain boundaries is sold and is wrongly described as containing a certain area, the error in area is regarded as a mere misdescription and does not vitiate the deed. The maxim *demonstratio falsa non nocet* applies.

The rule is well established in English law. For example "if a landlord having but one house in a street, describe it in a lease by a wrong number and then let a tenant into possession under it, he cannot afterwards rely on the error and contend that no interest passed, for the number is rejected as an immaterial part of the description" and again "where lands are described by the number or name of the lot or parcel, and also by metes and bounds, and the grantor owns lands answering to the one description and not to the other, the description of the lands owned by him will be taken to be the true one and the other will be rejected as *demonstratio falsa*." "(Taylor on 'Evidence,' 9th edition, section 1221, and cases there cited.)

That is just the present case. A case exactly similar to the present case will be found reported in *Santaya* v. *Savitri*(1) where Jenkins, C.J., said, 'It is clearly settled that where there is sufficient description set forth of the premises by giving the particular name of the field or otherwise, a false description added thereto may be rejected' and the Court held that the addition of a wrong survey number did not invalidate the plaintiff's claim, the land being otherwise sufficiently identified."

(1) 4 Bom. L.R., 871.

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KARUPPA GOUNDAN *alias* THOPPALA GOUNDAN *v.* PERIATHAMBI GOUNDAN.

The Courts below having erred in dismissing the plantiff's suit on this preliminary point, their decrees are set aside and the suit is remanded to the District Munsif for disposal according to law. The plaintiff should be allowed to amend his plaint by adding a prayer for the rectification of exhibit A.

Costs in this and in the lower Appellate Court will be costs in the suit.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1907. March 5.

DERAJE MALINGA NAIKA (PLAINTIFF), APPELLANT,

v.

MARATI KAVERI AND ANOTHER (DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Jurisdiction of Civil Courts—Order of Magistrate for maintenance under s. 488 of the Code of Criminal Procedure does not oust the jurisdiction of Civil Courts—No injunction to restrain proceedings on order under s. 488.

The first defendant obtained an order for maintenance under section 488 of the Code of Criminal Procedure against plaintiff. In a suit brought by plaintiff subsequently against the first defendant and her minor son, the second defendant, for a declaration that the defendants had no right to a share in or maintenance out of his properties:

Held, (1) that the suit was not one to set aside the Magistrate's order for maintenance and was sustainable. The Magistrate's order did not take away the jurisdiction of the Civil Courts.

(2) No suit will lie for an injunction to restrain proceedings under an order made by a Magistrate under section 488 of the Code of Criminal Procedure.

Veeran v. *Ayyammah*, (2 Weir, 615), approved.

Mahomed Abid Ali Kumar Kadar v. *Ludden Sahiba*, (I.L.R., 14 Calc., 276), followed.

Subhudra v. *Basdeo Dube*, (I.L.R., 18 All., 29), explained.

SUIT by the plaintiff for a declaration that the first defendant was not his lawful wife as she was divorced; that the second defendant was not his son; and that the defendants had no claim against him for a share of the properties, or maintenance.

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* Second Appeal No. 1254 of 1904, presented against the decree of H. O. D. Harding, Esq., District Judge of South Canara, in Appeal Suit No. 198 of 1903, presented against the decree of M.R.Ry. A. Subrahmania Ayyar, District Munsif of Puttur, in Original Suit No. 446 of 1902.

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DERAJE MALINGA NAIKA v. MARATI KAVERI.

Prior to the suit the first defendant had applied to the Magistrate and obtained an order for maintenance against the plaintiff under section 488 of the Code of Criminal Procedure. The defendants contended *inter alia* that the suit was an attempt to set aside the order of the Magistrate and was unsustainable.

The District Munsif upheld the contention and dismissed the suit.

On appeal his decision was confirmed.

Plaintiff appealed to the High Court.

Mr. *C. Madhavan Nair* and *U. Babu Rau* for appellant.

K. P. Madhava Rau and *K. S. Ramaswami Sastri* for first respondent.

JUDGMENT.—We do not think the decision of the Courts below that the suit is not maintainable can be upheld. We think the case of *Veeran* v. *Ayyammah*(1) was rightly decided, and that it cannot be distinguished on the ground suggested, viz., that the objection to the jurisdiction of the Civil Court was not taken in the suit but in the subsequent magisterial proceedings. The order states expressly that the Magistrate's order for maintenance did not take away the jurisdiction of the Civil Courts. The same view was taken in *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba*(2). In *Subhudra* v. *Basdeo Dube*(3), the Judges treated the suit as one in which the plaintiff sought to have the maintenance order set aside. We see no reason why the present suit should be so treated or why a suit claiming the declaration which the plaintiff asks for is not maintainable.

As regards the objection that the plaintiff was entitled to ask for an injunction and omitted to do so, we think the objection fails on the ground pointed out in *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba*(2) that he was not entitled to ask for an injunction.

The decrees of the lower Courts must be set aside and the case must go back to the Court of First Instance to be dealt with according to law.

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(1) 2 Weir, 615. (2) I.L.R., 14 Calc., 276.
(3) I.L.R., 18 All., 29.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1907. February 12, 14. March 6.

TALLAPRAGADA SUNDARAPPA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

BOORUGAPALLI SREERAMULU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Limitation Act, Act XV of 1877, sch. II, arts. 95, 120—Fraud must be fraud on party to the decree or transaction—Art. 120 applies to suits by reversioner for relief against fraudulent decree brought about by widow—Cause of action accrues when injury done to reversion—Civil Procedure Code, s. 244—Does not apply when decree itself is impugned—Res judicata.

Fraud within the meaning of article 95 of schedule II of the Indian Limitation Act is fraud practised upon a party to the decree or transaction in which the fraud was committed.

Chunder Nath Chowdhry v. *Tirthanund Thakoor*, (I.L.R., 3 Calc., 504), followed.

Article 95 does not apply to suits by a reversioner impeaching on the ground of fraud against himself transactions of a preceding qualified owner to which he was no party. The period of limitation applicable to such cases is that prescribed by article 120.

If the reversioner brings a declaratory suit to set aside the decree or other transaction brought about by the fraud of the qualified owner, the suit must be brought within six years of such decree or transaction. He is not however bound to bring such a suit, and it is open to him to wait until the succession falls in and if thereafter anything is done constituting an injury to his vested right, then to pursue his remedy.

Where property in the hands of the reversioner is attached in execution of a fraudulent decree against the widow, the injury is the attachment, and a suit for redress in respect of such attachment will not be barred under article 120 if brought within six years of the attachment, which is the cause of action.

Parekh Ranchor v. *Bai Vakhat*, (I.L.R., 11 Bom., 119), not followed.

An objection by the reversioner in execution to the attachment on the ground that the decree is not binding on his reversionary right is not triable in execution under section 244 and any adjudication thereon, not being appealable under section 244 will not be binding in subsequent proceedings.

SUIT for a declaration that the decree in Small Cause Suit No. 582 of 1894 on the file of the Sub-Court of Ellore obtained by first

* Second Appeal No. 1028 of 1904, presented against the decree of F. H. Hamnett, Esq., District Judge of Godavari, in Appeal Suit No. 519 of 1903, presented against the decree of M.R.Ry. T. A. Narasimhachari, District Munsif of Bhimavaram, in Original Suit No. 148 of 1903.

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defendant against Tallapragada Venkamma was void as against the plaintiffs, and that the attachment made in execution of the said decree against the property as per plaint schedule was illegal.

TALLAPRAGADA SUNDARAPPA v. BOORUGAPALLI SREERAMULU.

The properties belonged to one Subbaroyadu at whose death they devolved on his mother Venkamma. The plaintiffs who were the reversionary heirs alleged that Venkamma and defendants Nos. 1 and 2 fabricated a document purporting to have been executed by the deceased Subbaroyadu in favour of first defendant, that the second defendant had instigated the first defendant to file a suit (Small Cause No. 582 of 1894) thereon against Venkamma; that a decree was obtained by collusion, and that after Venkamma's death, the second defendant instigated the first defendant to take out execution and the plaint properties were attached. Plaintiffs objected that the decree was fraudulent and their objection was dealt with under section 244 of the Code of Civil Procedure and disallowed on 1st August 1898.

The present suit was filed on 17th September 1901.

The District Munsif, and on appeal, the District Judge held that the suit was barred by article 95 of schedule II of the Limitation Act and dismissed the suit.

Plaintiffs appealed to the High Court.

T. V. Seshagiri Ayyar for appellants.

K. Subrahmania Sastri for first respondent.

JUDGMENT.—The allegations, with reference to which this case has to be decided, are in effect these:—

One Subbarayudu to whose estate the plaintiffs, as heirs, have succeeded on the death of Subbarayudu's mother, was not indebted to the first defendant. But the mother and the first defendant who was related to her got up, after Subbaraya's death, a bond for a sum of money as one which had been executed by him. The first defendant brought a suit upon that instrument against the mother then in possession of the estate as Subbaraya's heir and obtained, in the suit, a decree by consent, such consent having been given by the mother in pursuance of the conspiracy those parties had entered into.

On the death of Subbaraya's mother, the first defendant sought to proceed against the estate in the hands of the plaintiffs. The plaintiffs objected to the execution being granted on the ground that the decree was not binding on them. Their objection having been overruled, an attachment of the estate followed. The question

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TALLAPRAGADA SUNDARAPPA *v.* BOORUGAPALLI SREERAMULU.

is whether the present suit is barred by limitation under article 95 of the second schedule to the Limitation Act as held by the lower Courts. The answer must, in our opinion, be in the negative.

Assuming the plaintiff's allegations to the effect stated above to be well-founded, the fraud was not one within the meaning of that term in the article relied on by the lower Courts. As pointed out in *Chunder Nath Chowdhry* v. *Tirthanund Thakoor*(1) cited by Mr. Seshagiri Ayyar on behalf of the plaintiffs, the fraud contemplated by the said article is a fraud practised upon a party to the decree or a party to a transaction in which the fraud was committed. It was in that case held that where the holder of a *patni* lease with intent to defraud the reversioner brought the property to sale for arrears of revenue, the suit by the latter impeaching the sale was not governed by article 95. The present case is, on principle, the same.

Now, take for example, the case of a mortgage or a charge created by a qualified female proprietor for a debt purporting to have been due by the last male owner but not really due and falsely put forward by the qualified proprietor with the object of making it appear that the transaction was binding on the reversionary heirs, it would be impossible to hold that article 95 applies to such a case. If the reversionary heir brought a suit for a declaration that the mortgage was not binding on him such a suit would, of course, be governed not by article 95 but by article 120. The circumstance that the qualified owner employs a different machinery, viz., a fraudulent decree for imposing a liability on the estate in the reversioner's hands cannot make any difference. If the present suit is to be viewed merely as a suit to have it declared that the decree is not binding on him, then, no doubt, the suit would be barred under article 120, as having been instituted more than six years from the date of the decree when his right, in so far as he has a right to institute such a declaratory suit, should be taken to have been infringed. Now, unquestionably, a person entitled to succeed as reversionary heir is not bound to sue for a declaration. It is quite open to him to wait until the succession falls in and if thereafter anything is done constituting an actual injury to his vested right, then to pursue his remedy. It is obvious that the injury in respect of which

(1) I.L.R., 3 Calc., 504.

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TALLAPRAGADA SUNDARAPPA v. BOORUGAPALLI SREERAMULU.

it has become necessary to the plaintiffs to obtain redress is the attachment in execution and not the passing of the decree itself.

The cause of action in the present case, therefore, really arose on the attachment taking place, and the suit must be held to be in time as it was instituted within six years from the date of the attachment, the case falling under article 120, as one not otherwise provided for. No doubt the *dictum* in *Parekh Ranchor* v. *Bai Vakhat*(1) is not consistent with this view but it is opposed to the actual decision in *Chhaganram Astikram* v. *Bai Motigavri*(2) which will be found referred to with approval in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu*(3).

Next, as to the contention on behalf of the defendants that the order overruling the objection of the plaintiffs against the execution of the decree and allowing the attachment is a bar to the present suit, it is clearly unsustainable. The case of the plaintiffs being that the decree itself was one not binding on them as there was no debt due by the last male owner, the question thus raised with reference to the decree is not one which could have been tried in execution, and section 244 of the Civil Procedure Code has no application to the case. We should add that, even assuming as the defendant's vakil suggested that the order overruling the plaintiff's objection to the execution (which, however, has not been put on the record) did proceed on the Court's opinion as to the truth or otherwise of the allegations by the plaintiffs, the matter so dealt with not being, as just stated, one relating to the execution of the decree, the plaintiffs could not have preferred an appeal in respect of it, and, therefore, such opinion would not be of avail to the defendants, as a conclusive adjudication binding upon the plaintiffs.

We, therefore, set aside the decrees of the lower Courts and remand the suit to the Court of First Instance for disposal according to law.

The costs in this and in the lower Appellate Court should abide and follow the result.

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(1) I.L.R., 11 Bom., 119. (2) I.L.R., 14 Bom., 512.
(3) I.L.R., 29 Mad., 390 at p. 409.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1907. March 11, 12. April 9.

TIRUMALACHARIAR AND ANOTHER (DEFENDANTS NOS. 3 AND 7), APPELLANTS,

v.

ANDAL AMMAL AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Hindu Law—Mitakshara—Succession of Bandhus—Daughter's son's son entitled to preference over daughter's daughter's son—Variance between pleading and proof.

A plaintiff who sues on and fails to prove an alleged gift, may rely on his title by inheritance.

Under the Mitakshara Law, among persons claiming to succeed as Bandhus, preference may be extended so as to prefer, all other considerations being equal, that claimant between whom and the stem there intervenes one female link to that claimant who is separated from the stem by two such links.

A daughter's son's son will have preference over a daughter's daughter's son.

SUIT for possession of land. The plaintiffs claimed as the heirs of the daughter's son's son of the last male owner. The second defendant is the daughter's daughter's son. The plaintiffs' claim, as laid in the plaint, was based on an alleged gift by the last male owner to the father, as whose heirs they have sued. The gift was found not to have been proved, but the Munsif gave a decree for a moiety of the properties on the ground that plaintiffs' father and second defendant were equally entitled as Bhandus to succeed. On appeal the District Judge held that plaintiffs' father was the preferable heir and decreed the whole property to plaintiffs.

Defendants appealed.

The Hon. Sir *V. C. Desikachariar* for appellants.

The Hon. Mr. *P. S. Sivaswami Aiyar* for respondents.

JUDGMENT.—Three questions are raised by the appellants :

They contended—

(1) that the plaintiffs having relied on a gift must fail as the gift is not proved ;

(2) that the second defendant as daughter's daughter's son of Narayana Iyengar is entitled to succeed to his property equally

* Second Appeal No. 1075 of 1904, presented against the decree of W. W. Phillips, Esq., District Judge of Tinnevelly, in Appeal Suit Nos. 165 and 155 of 1903, presented against the decree of M.R.Ry. M. R. Narayanaswamy Aiyar, District Munsif, Ambasamudram in Original Suit No. 158 of 1902.

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with Srinarayana Iyengar, the deceased father of the plaintiffs, who was the son's son of Narayana Iyengar's daughter, and

(3) that Srinarayana Iyengar and the second defendant took the property as joint tenants and the second defendant is therefore entitled to it by virtue of survivorship.

There is no force in the first contention. The plaintiffs were entitled, if they failed to prove the alleged gift, to fall back upon their title as heirs of Narayana Iyengar. The second contention is the most important. Srinarayana Iyengar and the second defendant are both lineally descended from Narayana Iyengar through his daughter Anandammal, and are both removed from him an equal number of degrees of relationship. The only difference between them is that Narayana Iyengar was the maternal grandfather of Srinarayana's father, while he was the maternal grandfather of second defendant's mother. A daughter's daughter has been declared by this Court to be an heir (*Ramappa Udayan* v. *Arumugath Udayan*(1)), and we cannot, perhaps, go so far as to adopt the suggestion that the second defendant is entirely excluded from the line of heritable bandhus (West and Bühler, page 498) and the footnote on page 492; but we think that he must, at any rate, be postponed to Anandammal's son's son.

We base our decision on the general preference exhibited by the Mitakshara for the male over the female line (Mayne, page 784). We think that that preference, of which it is unnecessary to give instances, may legitimately be extended so as to prefer, all other considerations being equal, that claimant between whom and the stem there intervenes only one female link, to that claimant who is separated from the stem by two such links. In this view, the third contention does not require consideration. The second appeal is dismissed with costs.

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(1) I.L.R., 17 Mad., 182.

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APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Miller.

1907. March 22. April 16.

RENGASAMI NADAN AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

SUBBAROYA IYEN AND ANOTHER (PLAINTIFF AND THIRD DEFENDANT), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, *ss.* 67, 96, 97—*Person holding two mortgages on the same property, the first usufructuary and the second simple, can bring the property to sale in suit on the second mortgage free of the first mortgage.*

A person holding two mortgages on the same property, the first an usufructuary and the second a simple mortgage, can sue under section 67 of the Transfer of Property Act to recover the money on the simple mortgage by bringing the property to sale free of the usufructuary mortgage. The decree in such a case should direct the property to be sold and the sale-proceeds to be applied first in discharge of the usufructuary mortgage and the balance in discharging the second mortgage. The fact that no suit for sale could be brought on the usufructuary mortgage will be no bar to such mortgage being paid out of proceeds derived by the sale of the property on another mortgage.

Govinda Bhatta v. Narain Bhatta, (I.L.R., 29 Mad., 424), followed in principle.

Bhagwan Doss v. Bhawani, (I.L.R., 26 All., 14), not followed.

Sections 96 and 97 of the Transfer of Property Act do not in terms exclude usufructuary mortgages and their provisions may be applied to such mortgages.

THE first defendant and the third defendant's father executed a usufructuary mortgage of the plaint properties to plaintiff's father in August 1884 and subsequently the equity of redemption was mortgaged to plaintiff in November 1902. Plaintiff sued to recover the money due to him under the two mortgages by sale of the plaint properties. Defendants contended that no suit for sale was sustainable on the first mortgage as it was usufructuary, and a sale under the second mortgage subject to the first, was contrary to sections 99 of the Transfer of Property Act. The Munsif passed a decree for sale on the simple mortgage and added a direction that the properties would be subjected to the usufructuary mortgage until redeemed. This judgment was

* Second Appeal No. 1296 of 1904, presented against the decree of M.R.Ry. C. G. Kuppusami Aiyar, Subordinate Judge of Tanjore, in Appeal Suit No. 1317 of 1903, presented against the decree of M.R.Ry. P. Aiyasami Mudaliar, District Munsif of Tiruvadi, in Original Suit No. 382 of 1903.

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confirmed on appeal. The first and second defendants appealed to the High Court on the ground that no sale ought to have been ordered, and the plaintiff filed a memorandum of objections on the ground that he was entitled to a decree on both the mortgages.

G. S. Ramachandra Ayyar for appellant.

T. V. Muthukrishna Ayyar for *T. V. Seshagiri Ayyar* for first respondent.

JUDGMENT.—The plaintiff holds two mortgages on the same property, the prior mortgage being usufructuary, and the latter a mortgage on which he has a right to sue for sale.

We do not think the second mortgage can be so construed as to postpone the right of the mortgagee to sue upon it until such time as the mortgagor chooses to redeem both.

The last paragraph of the document contains an undertaking by the mortgagor to redeem the second mortgage before or with the first, an undertaking which may be unnecessary, but does not, as we read it, restrict the rights of the mortgagee.

The lower Courts have given the plaintiff a decree for sale of the mortgaged property subject to the prior mortgage.

It is unnecessary for us to decide whether the plaintiff is entitled to sue for sale on one of his mortgages alone subject to the other, for he has asked us only for a sale on the second free of the first.

For the appellants, it is contended that inasmuch as the prior mortgage is usufructuary and consequently the plaintiff cannot sue for a sale on it, he cannot ask for a sale free of it, and reliance is placed on *Bhagwan Doss* v. *Bhawani*(1).

In *Govinda Bhatta* v. *Narain Bhatta*(2), however, a sale free of an usufructuary mortgage was permitted to an attaching creditor suing for a sale by virtue of section 99 of the Transfer of Property Act. That decision is applicable to the case before us when the plaintiff is a simple mortgagee suing for sale under section 67; and, with due deference to the learned Judges of the Allahabad High Court, we are unable to see why the usufructuary mortgagee should not, when the property has to be sold under another mortgage, be paid off out of the proceeds, although he could not, as usufructuary mortgagee, have sued for a sale himself.

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(1) I.L.R., 26 All., 14. (2) I.L.R., 29 Mad., 424.

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RENGASAMI NADAN v. SUBBAROYA IYEN.

The subsequent mortgage in the case before us is between the same parties as the earlier one, and there is no hardship in visiting upon the mortgagor the consequences of his own act in creating a mortgage upon which a sale could follow and no reason why the subsequent mortgagee should be deprived of the right of sale secured to him by his contract.

Neither section 96 nor section 97 of the Transfer of Property Act excludes in terms an usufructuary mortgage and we are of opinion that the provisions of those sections may be applied to such a mortgage.

We modify the decree by directing that the sale be free of the first mortgage striking out the words "This Court doth further order and decree that the original usufructuary mortgage will continue unless defendants redeem it," and directing that the sale-proceeds, if the property is sold, be applied in satisfaction of the plaintiff's mortgages on the property in order of their priority. Time for payment extended to 1st September next The appellant will pay the costs of the appeal.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. April 12, 16.

MONICA KITHERIA SALDANHA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

SUBRAYA HEBBARA AND OTHERS (DEFENDANTS NOS. 2 TO 6), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, *s.* 108 (*j*)—*Assignee of lease, liability of, to lessor—Liable for rent from date of assignment and not from date of obtaining possession—Principle applies to agricultural leases.*

Under section 108 (*j*) of the Transfer of Property Act a lessee may transfer his privity of estate to an assignee, thus rendering the latter liable to the lessor on covenants running with the land, while he himself will continue liable to the lessor by reason of his privity of contract which does not pass by assignment.

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* Second Appeal No. 73 of 1905, presented against the decree of H. O. D. Harding, Esq., District Judge of South Canara, in Appeal Suit No. 343 of 1903, presented against the decree of M.R.Ry. V. B. Ramasawmy Aiyar, District Munsif of Kundapoor, in Original Suit No. 378 of 1903.

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The liability of the assignee arises from the date of assignment and not from the date when he obtains possession.

This is the law in England and there is nothing in the Transfer of Property Act to make a different rule applicable in this country.

Kunhanujam v. *Anjelu*, (I.L.R., 17 Mad., 296), referred to.

Although the Transfer of Property Act does not apply to agricultural leases, there is no reason why the above rule should not be applied to them as well as to non-agricultural leases.

The assignee of an agricultural lease becomes liable for the rent payable to the lessor from the date of assignment.

Kamala Nayak v. *Ranga Rao*, (1 M.H.C.R., 24), dissented from.

Macnaghten v. *Lalla Mewa Lall*, (3 Calc. L.R., 285), dissented from.

THE first defendant obtained from plaintiff certain lands on mulgeni lease in 1884. In execution of a decree against first defandant this mulgeni lease was sold, and purchased by the father of the defendants Nos. 2 to 6 in November 1899. The first defandant, however, continued in possession till December 1900, and collected the rents due from the tenants for 1900 and 1901. The father of defendants Nos. 2 to 6 got possession in December 1900. The plaintiff sued to recover, from such of the defendants as should be found liable, the rent under the mulgeni lease for 1900–1903. Defendants Nos. 2 to 6 pleaded non-liability for 1900 and 1901. The Munsif passed a decree for 1900 and 1901 against first defendant and if not recovered from him against defendants Nos. 2 to 6; and against Nos. 2 to 6 for 1902 and 1903.

On appeal the defandants Nos. 2 to 6 were exonerated from liability for the rent for 1900 and 1901, on the ground that they were not in enjoyment. Plaintiffs appealed to the High Court.

M. Narayanaswami Ayyar for *S. Srinivasa Ayyangar* for appellants.

K. P. Madhava Rau and *K. S. Ramasawmi Sastri* for respondents.

JUDGMENT.—This is a suit instituted by the plaintiffs to recover arrears of rent for the years 1900 to 1903 from the first defendant who was the original mulgenidar, and from defendants Nos. 2 to 6 whose father purchased the first defendant's mulgeni right at a Court sale held in execution of a decree against the first defendant. The District Munsif gave judgment for the rent due for 1900 and 1901 with interest against the first defendant, and in the event of failure to recover from the first defendant, against defendants Nos. 2 to 6, and also gave judgment against

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MONICA KITHERIA SALDANHA *v.* SUBRAYA HEBBARA.

defendants Nos. 2 to 6 for the rent due for 1902 and 1903 with interest. Defendants Nos. 2 to 6 appealed against so much of the decree as rendered them liable for the rent of 1900 and 1901 on the ground that during these years they had been kept out of possession by the first defendant; and the District Judge upheld their contention and modified the decree of the lower Court accordingly. Against this decree the plaintiffs now appeal. Defendants Nos. 2 to 6 are admittedly in the position of assignees of the first defendant's mulgeni lease, and it is contended for the appellants that the effect of the transfer from the first defendant to defendants Nos. 2 to 6 was to create a privity of estate between the plaintiffs as lessors and defendants Nos. 2 to 6 as assignees of the lessee, the first defendant; and to render them liable on covenants running with the land as from the date of the assignment. This has long been settled law in England (*Walker* v. *Reeve*(1) and *Williams* v. *Bosanquet*(2) and was applied by Muttusami Ayyar, J., sitting alone in *Kunhanujam* v. *Anjelu*(3). The liability of the assignee arises by reason of his privity of estate, and this privity of estate is created by the transfer to him and not by his obtaining possession. Similarly when the assignee in turn assigns over, his privity of estate ceases, and consequently his liability also ceases in respect of breaches of covenant committed after he has assigned over. Section 108 (*j*) of the Transfer of Property Act recognizes the right of a lessee to transfer his privity of estate to an assignee thus rendering the assignee liable while at the same time the lessee himself is made to continue liable by reason of his privity of contract which does not pass by the assignment. If the Legislature had considered the well established rule of English law making the assignee of a lease liable as from the date of assignment inapplicable, and that his liability should be conditional upon his obtaining possession, it would, we think, have said so, and not having done so, must have considered the English rule suitable to be applied in cases arising under the Act. The present case, it is true, is not governed by the Transfer of Property Act as the lease is an agricultural one; but there appears to be no reason for applying a different rule on a point of this kind to agricultural as opposed to non-agricultural leases;

(1) 3 Douglas' Reports, 19. (2) Broderip and Bingham's Reports, vol. I, [illegible]
(3) I.L.R., 17 Mad., 296.

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and we think the rule above laid down is equally applicable to both. The respondents relied on *Kamala Nayak* v. *Ranga Rao*(1); but in that case the learned judges appear to have considered that the privity, which must mean privity of estate, on which the liability of the assignee depends, does not arise until the assignee obtains possession. No reasons are given for this view which, as we have already shown, is opposed to authority, and we must decline to follow this case and the somewhat similar ruling in *Macnaghten* v. *Lalla Mewa Lall*(2), which was also relied on by the respondents. In the result, we must allow the appeal, and set aside the decree of the District Judge and restore the decree of the District Munsif except as regards the modification made by the District Judge as regards interest which we accept with costs in this and the lower Appellate Court.

MONICA KITHERIA SALDANHA v. SUBBAYA HEBBARA.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. March 13, 14, 21.

SANKARALINGA REDDI AND OTHERS (PETITIONERS), APPELLANTS,

v.

KANDASAMI TEVAN AND OTHERS (RESPONDENTS), RESPONDENTS.*

Attachment, effect of—Creates legal rights though it creates no charge having priority over other creditors—Action maintainable for wilful infraction of such right, without justification.

An attaching creditor does not acquire any charge on the attached property which would give him priority over other creditors claiming rateable distribution or over the general body of creditors proving in an insolvency of the judgment-debtor. He however acquires a right to have the property kept in *custodia legis* for the satisfaction of his debt.

An intentional interference, without sufficient justification, with such right is an actionable wrong for which an action will lie.

Suraj Bunse Koer v. *Sheo Persad Singh*, (I.L.R., 5 Calc., 148 at p. 174), referred to.

Krishna Rau v. *Lakshmana Shanbhogue*, (I.L.R., 4 Mad., 302), referred to.

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(1) 1 M.H.C.R., 24. (2) 3 Calc. L.R., 285.

* Appeal No. 80 of 1906, presented under clause 15 of the Letters Patent against the judgment of Mr. Justice Miller in Civil Revision Petition No. 236 of 1905, presented against the decree of the Subordinate Judge's Court of Madura (West) in Small Cause Suit No. 228 of 1905.

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SANKARA-LINGA REDDI v. KANDASAMI TEVAN.

Frederick Peacock v. *Madan Gopal*, (I.L.R., 29 Calc., 428), distinguished.

Krishnasawmy Mudaliar v. *Official Assignee of Madras*, (I.L.R., 26 Mad., 673), distinguished.

Quin v. *Leatham*, ([1901] A.C., 495), referred to.

Where property attached in execution is removed by one who is not a party to the suit, the decree-holder must enforce his claim by a separate suit and not in execution.

Mirza Mahomed Aga Ali Khan v. *The Widow of Balmakund*, (L.R., 3 I.A., 241), distinguished.

THE plaintiffs attached in execution of a decree certain crops belonging to the judgment-debtor. The first defendant (who is the undivided father of defendants Nos. 2 to 4) who was no party to that suit carried away the crops so attached. A claim petition by plaintiffs under section 276 of the Code of Civil Procedure was dismissed and plaintiffs were referred to a regular suit. The plaintiffs sue to recover damages for such wrongful removal.

The District Munsif dismissed the suit holding that the plaintiffs had no cause of action as their attachment created no interest in the property attached. A revision petition by plaintiffs to the High Court was dismissed by Mr. Justice Miller. Plaintiffs appealed under clause 15 of the Letters Patent.

C. V. Anantakrishna Ayyar for *S. Srinivasa Ayyangar* for appellant contended that it was not correct to say that attachment created no interest whatever in the attached property and referred the following authorities: *Krishna Rau* v. *Lakshmana Shanbhogue*(1), *Hanumantha* v. *Hanumayya*(2) and *Suraj Bunsi Koer* v. *Sheo Persad Singh*(3). *Moti Lal* v. *Karrabuldin*(4) is no authority for the proposition that attachment creates no interest whatever. It only decided that attachment creates no title. Attachment places property in the custody of law and referred to *Peary Lal Sinha* v. *Chandicharan Sinha*(5), and *Orr* v. *Muthia Chetty*(6).

Plaintiffs have a cause of action as defendants by carrying away the property prevented plaintiffs from realising the decree debt (*Quin* v. *Leatham*(7) and *Allen* v. *Flood*(8)). Plaintiffs' claim could not be decided in execution under the Code of Civil Procedure as defendants were not parties to the suit.

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(1) I.L.R., 4 Mad., 302.
(2) I.L.R., 5 Mad., 232.
(3) I.L.R., 5 Calc., 148 at p. 174.
(4) I.L.R., 25 Calc., 179.
(5) 11 C.W.N., 163 at p. 168.
(6) I.L.R., 17 Mad., 502.
(7) (1901) A.C., 495 at p. 498.
(8) (1898) A.C., 1 at p. 96.

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The Hon. Sir V. C. Desikachariar for respondents contended that section 244 of the Code of Civil Procedure barred the suit and referred to *Mirza Mahomed Aga Ali Khan* v. *The Widow of Balmakund*(1). Attachment creates no title—*vide Moti Lal* v. *Karrabuldin*(2), *Frederick Peacock* v. *Madan Gopal*(3), *Krishnasawmy Mudaliar* v. *Official Assignee of Madras*(4).

C. V. Anantakrishna Ayyar in reply. *Mirza Mahomed Aga Ali Khan* v. *The Widow of Balmakund*(1) was a suit on a judgment and is not in point. The present suit arose out of attachment and was against a stranger to the suit. Attaching-creditor has an interest sufficient to give him a cause of action against the party injuring such interest.

JUDGMENT.—The plaint in this case is singularly confused, but the suit has been treated as a suit for damages by the plaintiffs' attaching creditors, against the defendants in respect of the alleged action of the first defendant in cutting and carrying away crops attached by the plaintiffs as the property of the judgment-debtor after a claim petition put in by the defendants under section 278 of the Civil Procedure Code had been rejected. The Subordinate Judge dismissed the suit on the ground that the plaintiffs were not entitled to maintain the suit as they had acquired no interest in or title to the property attached, and this decision was affirmed in revision by the learned Judge from whose judgment the present appeal is brought under section 15 of the Letters Patent.

We think the appeal must be allowed on the ground that conduct attributed to the defendants constitutes a violation of the legal rights of the plaintiffs and amounts to an actionable wrong. It is true that the plaintiffs did not, by attaching the crops, acquire any charge on the attached property which would give them priority over other decree holders applying for rateable distribution under section 295 of the Civil Procedure Code or against the general body of creditors proving in an insolvency of the judgment-debtor. None the less by virtue of the attachment the plaintiffs acquired a right to have the whole of the attached property applied in satisfaction of their debt if no other creditors came forward, and in any case to have a rateable proportion so

(1) L.R., 3 I.A., 241. (2) I.L.R., 25 Calc., 179.
(3) I.L.R., 29 Calc., 429. (4) I.L.R., 26 Mad., 673.

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SANKARALINGA REDDI v. KANDASAMI TEVAN.

applied. It is in this sense that the attaching creditor is said to have a charge on the attached property in *Suraj Bunsi Koer* v. *Sheo Persad Singh*(1) and *Venkatappiah* v. *Jagannadha Rao*(2), and that it was held in *Krishna Rau* v. *Lakshmana Shanbhogue*(3), to prevent the attached property passing by survivorship, see also *Peary Lal Sinha* v. *Chandi Charan Sinha*(4). The decisions in *Frederick Peacock* v. *Madan Gopal*(5) and *Krishnasawmy Mudaliar* v. *Official Assignee of Madras*(6) that the attaching creditor does not, by the attachment, acquire priority over other creditors coming in later are, in no way, opposed to this view.

The plaintiffs having thus a legal right to have the attached property kept in *custodia legis* for the satisfaction of their debt in the manner pointed out above, the defendants according to the plaint violated that legal right by taking it out of such custody and rendering it unavailable for the satisfaction of the plaintiffs' claim. An intentional interference with the legal right of another person is an actionable wrong unless there be sufficient justification for the interference. *Glamorgan Coal Company Limited* v. *South Wales Miners' Federation*(7) affirmed in *Gardner* v. *Hodgson's Kingsten Brewery Company*(8), following *Quin* v. *Leatham*(9) and the facts alleged in the plaint are therefore in our opinion sufficient to support an action for damages. The amount of the damages sustained by the plaintiffs will depend on the evidence but cannot exceed the value of the attached property (*Turner* v. *Ford*(10)).

It has been strongly contended for the respondent on the authority of *Mirza Mahomed Aja Ali Khan* v. *The Widow of Balmakund*(11) that no suit will lie under the circumstances of the present case and that the matter should have been dealt with in execution. In that case the decree-holder, instead of attaching the property of the judgment-debtor in the hands of a third party under the Code, sued the third party to recover the property and was held to have no cause of action. Here, as already pointed out, there is a cause of action arising from the alleged wrongful

(1) I.L.R., 5 Calc., 148 at p. 174.
(2) 12 M.L.J., 24 at p. 27.
(3) I.L.R., 4 Mad., 302.
(4) 11 C.W.N., 163.
(5) I.L.R., 29 Calc., 428.
(6) I.L.R., 26 Mad., 673.
(7) [1903] 2 K.B., 545.
(8) [1903] A.C., 229 at p. 239.
(9) [1901] A.C., 495 at p. 498.
(10) 15 M. & W., 212 at p. 215.
(11) L.R., 3 I.A. 241.

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interference by the defendants with the legal rights of the plaintiffs. Further, if no suit lies, it is not apparent what remedy the plaintiffs have, as section 254 of the Civil Procedure Code, does not apply to the defendants who are not parties to the suit and according to the view taken in *Kochappa* v. *Sachi Devi*(1) the attaching Court has no inherent power to commit for contempt. We confine our judgment to the preliminary point on which the suit was dismissed and which was argued before us and decide nothing as to whether the plaintiffs have any cause of action against the defendant other than the first.

SANKARA-LINGA REDDI v. KANDASAMI TEVAN.

The appeal is allowed and the case remanded to the Subordinate Judge for disposal according to law. Costs will abide.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

KOMMIREDDY SURAYANARAYANAMURTY (PETITIONER), APPELLANT,

v.

THE MADRAS RAILWAY COMPANY BY ITS AGENT AND MANAGER (DEFENDANT), RESPONDENT.*

1907. February 7, 12.

Indian Railways Act, IX of 1890, s. 67—Benefit of section not waived by Railway Company when the grant reserved accommodation under the rules.

The provision in section 67 of the Indian Railways Act that 'fares shall be deemed to be accepted and tickets deemed to be issued subject to the condition of there being room available in the train for which the tickets are issued' is introduced for the benefit of Railway Companies and can be waived by them. One of the rules under which reserved accommodation is granted is, 'Reserved carriages in mail trains can be provided when the load of the train permits.' In granting reserved accommodation on the terms embodied in the rules, the company does not contract itself out of the benefit conferred by section 67, and is not liable in damages for refusing to attach a reserved carriage to a mail train already fully loaded.

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(1) I.L.R., 26 Mad., 494.

* Appeal No. 65 of 1906, presented under clause 15 of the Letters Patient against the orders of Mr. Justice Moore, dated the 6th day of August 1906, in Civil Revision Petition No. 420 of 1905 (*vide* L.P.A. Nos. 66, 67, 68 and 69 of 1906).

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KOMMIREDDY SURAYANARAYANAMURTY v. THE MADRAS RAILWAY COMPANY BY ITS AGENT AND MANAGER.

SUIT to recover damages from the defendant Company for refusing to attach a carriage reserved by plaintiffs from Cocanada to Madras at Samalkot junction, in consequence of which the plaintiffs had to return to Cocanada. The suit was dismissed by the Munsif and a revision petition against his decree was also dismissed by Mr. Justice Moore.

The plaintiffs appealed under clause 15 of the Letters Patent.

T. V. Seshagiri Ayyar for appellant.

Mr. *D. Chamier* for respondents.

JUDGMENT.—We think the Learned Judge was right in dismissing the civil revision petitions against the judgment of the Subordinate Judge. The plaintiffs who were passengers from Cocanada to Madras by the night train on the 25th December 1905, seek to rocover damages for breach of contract by the Railway Company in not carrying them from Cocanada in the reserved carriage which had been allotted to them from Cocanada to Madras. At Samalkot junction, where the branch line from Cocanada joins the main line to Madras the railway authorities refused to connect the plaintiffs' reserved carriage with the mail train to Madras on the ground that the latter was already too heavy, and the plaintiffs failing to find accommodation in the mail train were obliged to return to Cocanada. The question is, was there any breach of contract on the part of the Railway in failing to carry the plaintiffs in their reserved carriage to Madras. The only written contract between the parties, is to be found in the tickets issued to the plaintiffs. Under section 67 of the Indian Railways Act, IX of 1890, "fares shall be deemed to be accepted and tickets to be issued subject to the condition of there being room available in the train for which the tickets are issued." Here the tickets were issued for the mail train from Samalkot to Madras. This is a provision introduced for the protection of the Railway, and on the principle *Quilibet potest renunciare juri pro se introducto* it may be that they could waive the benefit of this section, but the question is, have they contracted to do so? If the plaintiffs had left Cocanada in an unreserved carraige the Railway would, we are clearly of opinion, have been protected by section 67, if, owing to the mail train being full, they had been unable to carry the plaintiffs on that night beyond Samalkot, and we do not think they can be considered to have waived the protection of the section merely because they allowed the plaintiffs to take advan-

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tage of the rule which entitles five second-class passengers when travelling together to a reserved compartment when practicable. The reserved compartment must, in our opinion, be deemed to have been applied for by the plaintiffs and to have been granted by the Railway Company on the usual terms embodied in the rules as there is no evidence that any special terms were made; and one of these rules is that "reserved carriages in mail trains can only be provided when the load of the train permits." In our opinion the Railway Company did not contract themselves out of the benefit of section 67, and the plaintiffs must be deemed to have had notice that their reserved carriage could not be attached to the mail train unless the load permitted, which in this case it did not. We think therefore the plaintiffs were only entitled to the statutory relief given by section 67 of the Indian Railways Act, and this has been given them by the decree. We dismiss the appeals but under the circumstances make no order as to costs.

KOMMIREDDY SURAYA-NARAYANA-MURTY v. THE MADRAS RAILWAY COMPANY BY ITS AGENT AND MANAGER.

Messrs. *Orr, David & Brightwell* for respondents.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Miller.

1907. February 28.

KRISHNA BOI (DEFENDANT), APPELLANT,

v.

THE COLLECTOR AND GOVERNMENT AGENT, TANJORE, AND OTHERS (PLAINTIFF AND SUPPLEMENTAL RESPONDENTS), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, *s.* 27—*Court has power to order right persons to be substituted as plaintiffs even when original plaintiff had no right to sue.*

Under section 27 of the Code of Civil Procedure when a suit is instituted in the name of a wrong person as plaintiff by a *bonâ fide* mistake, the Court has power to substitute the names of right persons as plaintiffs; and this power is not

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* Civil Miscellaneous Appeal No. 180 of 1905, presented against the decree of M.R.Ry. I. L. Narayana Row Nayudu, Additional Subordinate Judge of Tanjore, in Appeal Suit No. 493 of 1905, presented against the decree of M.R.Ry. J. S. Gnaniyar Nadar, District Munsif of Tanjore, in Original Suit No. 358 of 1903.

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KRISHNA BOI v. THE COLLECTOR AND GOVERNMENT AGENT, TANJORE.

excluded in cases where the person originally suing has no right to institute the suit.

Chunder Coomar Roy v. *Gocool Chunder Bhuttacharjee*, (I.L.R., 6 Calc., 370), referred to.

SUIT in ejectment.

This suit was brought by the Collector and Government Agent of Tanjore, to eject defendant from a plot of land to the enjoyment of which the Mangalavilas (the concubines of the late Rajah of Tanjore) were entitled. The management of the Mangalavilas' estate was vested by Government in the Collector and the suit was instituted by him in the *bonâ fide* belief, that he was entitled to do so.

The District Munsif decided that the Collector had the right to sue and passed a decree in his favour. On appeal by the defendant, the plaintiff put in an interlocutory application praying that the members of the Mangalavilas may be substituted as plaintiffs in his place. The defendant objected that the Appellate Court could not exercise the power at that stage. The Subordinate judge finding that the Collector instituted the suit under a *bonâ fide* mistake, held that under sections 27 and 582 of the Code of Civil Procedure, he had power to substitute the right parties. He accordingly directed the members of the Mangalavilas to be substituted as plaintiffs in the case and reversing the decree remanded the suit for re-trial. The defendant appealed to the High Court.

T. V. Seshagiri Ayyar for appellant.

The Hon. the Acting Advocate-General for respondent.

JUDGMENT.—We think that section 27 of the Code applies to this case and that the substitution effected by the Subordinate Judge must be allowed.

In none of the cases cited before us was the question decided with reference to section 27, and in *Chunder Coomar Roy* v. *Gocool Chunder Bhuttacharjee*(1) it was pointed out that that section could be applied to a case in which the original plaintiff had no right to sue, provided that the suit was commenced through a *bonâ fide* mistake. The words of the section themselves are clear. The words "if the suit is brought in the name of the wrong person as plaintiff" cannot be construed as excluding altogether persons who may institute the suit without any right to do so.

(1) I.L.R., 6 Calc., 370.

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We see no reason to suppose that the suit was not commenced through a *bonâ fide* mistake : in fact, the contrary is clear.

We dismiss the appeal with costs.

KRISHNA BOI v. THE COLLECTOR AND GOVERNMENT AGENT, TANJORE.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. March 18, 19.

THE MANAGER OF SRI MEENAKSHI DEVASTANAM, MADURA (PETITIONER-PLAINTIFF), APPELLANT,

v.

ABDUL KASIM SAHIB (COUNTER-PETITIONER—DEFENDANT), RESPONDENT.*

Civil Procedure Code, Act XIV of 1882, *s.* 375—*Incorporation in compromise decree of terms which are not unlawful, though outside the scope of suit cannot be objected to in execution.*

Where a compromise betwen the parties to a suit embraces matters not relating to the suit, and the decree following such compromise gives reliefs which are not unlawful, but which could not have been given if the suit had been decided after trial, any objection to such decree on the ground that it is in contravention of section 375 of the Code of Civil Procedure, must be taken by way of appeal and not in execution of the decree.

Venkatappa Nayanim v. *Thimma Nayanim*, (I.L.R., 18 Mad., 410), referred to.

Mahibulla v. *Imami*, (I.L.R., 9. All., 229), referred to.

Kuruvetappa v. *Sirasappa*, (16 M.L.J., 354), referred to.

THE petitioner (plaintiff) filed a suit in the West Sub-Court, Madura, on the Small Cause Side for rent in respect of two shops. The counter-petitioner (defendant) denied plaintiff's title to the shops. Thereupon the Judge returned the plaint, under section 23 of the Small Cause Court's Act, to be presented on the regular side of the Munsif's Court. In this Court, the suit was compromised. The terms of the compromise were that, out of the sum claimed as rent, the plaintiff should relinquish Rs. 27–4–0, that including costs, etc., the defendant should give plaintiff Rs. 134 within 13th April 1904 ; that, if default was made, the relinquished portion should also be paid by the defendant, that the defendant

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* Civil Miscellaneous Second Appeal No. 29 of 1906, presented against the decree of J. Hewetson, Esq., District Judge of Madura, in Appeal Suit No 484 of 1905, presented against the order of M.R.Ry. T. A. Ramakrishna Aiyar, District Munsif of Madura, in Execution Petition No. 468 of 1905, in Original Suit No. 680 of 1902.

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THE MANAGER OF SRI MEENAKSHI DEVASTANAM, MADURA v. ABDUL KASIM SAHIB

should be allowed to hold on for another term of 11 years, the rent payable being at the rate of 3 rupees per mensem, that such rent should be paid on or before the 5th of the succeeding months, that, if default was made to pay one year's rent, the shops should be surrendered to plaintiff and that the plaintiff should be at liberty to recover the rent as well as take possession of the shops, if necessary, through process of Court. The above compromise was recorded and a decree allowed to be drawn up in terms thereof. The plaintiff now claimed to execute the above decree in all its terms. He prayed for possession of the shops, and to recover the rent due, viz., Rs. 290-2-10.

The defence was that the decree, so far as it embodied terms which were not the subject-matter of the suit, was not enforceable; that under section 375, Civil Procedure Code, the Court had no power to pass a decree in respect of matters foreign to the suit, and that the claim for possession of the shops and for rent not included in the suit could not be allowed in execution proceedings.

The District Munsif held that the decree was unenforceable so far as the possession of land was concerned. The District Judge upheld this decision on appeal. Petitioner appealed to the High Court.

C. V. Anantakrishna Ayyar for appellant.

K. Kuppuswami Ayyar for respondent.

JUDGMENT.—In this case the plaintiff sued for arrears of rent of a certain site reserving his right to bring a separate suit for the possession of the site. The suit was compromised and a decree was passed in terms of the compromise under which judgment was given for the arrears, but, in consideration of the improvement effected by the defendant, he was declared entitled to hold the property for eleven years more at a specified rent, but, if more than one year's rent should be in arrears, the plaintiff was to be at liberty to eject the defendant and to obtain possession through Court. The decree-holder now seeks to enforce this part of the decree in execution by ejecting the defendant, but both the lower Courts have held that he is not entitled to do so on the ground that the terms of the decree, in so far as they provide for the future tenancy of the defendant and his ejectment on default do not relate to the suit, and were inserted in the compromise decree in contravention of section 375 of the Civil Procedure Code, and without jurisdiction. We think the lower Courts were wrong. These

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terms might, no doubt, have been objected to on appeal (*Venkatappa Nayanim* v. *Thimma Nayanim*(1) and *Muthuvijaya Raghunatha Udayana Tevar* v. *Thandavaraya Tambiran*(2)), but there is nothing unlawful in them, and the mere fact that they are not reliefs which the plaintiff could have obtained in the suit if it had been tried out, affords no ground for questioning the decree in execution (*Mohibullah* v. *Imami*(3), *Kuruvetappa* v. *Sirasappa*(4) and see *Purna Chandra Sarkar* v. *Nil Madhub Naudi*(5)). The appeal must be allowed and the petition remanded to the District Munsif for disposal according to law. Costs in this and the lower Appellate Court will abide.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar.

1907. March 13.

THE CHAIRMAN OF THE MUNICIPAL COUNCIL, NELLORE (PLAINTIFF), PETITIONER,

v.

DWARAPALLY KOTTAMMA (DEFENDANT), RESPONDENT.*

District Municipalities Act (Madras), Act IV of 1884, *ss.* 47, 66 (1)—*Tax on houses, a yearly tax—When ownership arises after assessment, such owner liable for whole tax and not only for instalments accruing due after acquisition of ownership.*

The provisions of section 66 (1) and other sections of the Madras District Municipalities Act, show that the tax imposed on houses under section 47 of the Act is a *yearly* tax, although for the sake of convenience it may be made payable in instalments.

A person becoming the owner of a house subsequent to such assessment becomes liable as owner for the whole yearly tax and not only for the instalments that accrue due after his acquisition of ownership. It is not compulsory on the Municipality to apportion the tax among the several owners during the period and the provisions of the Transfer of Property Act regarding the obligations of buyer and seller in respect of the payment of taxes do not apply as between the Municipality and the subsequent owner.

(1) I.L.R., 18 Mad., 410.
(2) I.L.R., 22 Mad., 214.
(3) I.L.R., 9 All., 229.
(4) 16 M.L.J., 354.
(5) 5 Calc. W.N., 485.

* Civil Revision petition No. 510 of 1906, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of M.R.Ry. G. Kothandaramanjulu Nayudu, District Munsif of Nellore, in Small Cause Suit No. 326 of 1906.

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THE CHAIRMAN OF THE MUNICIPAL COUNCIL, NELLORE v. DWARAPALLY KOTTAMMA.

CLAIM for the recovery of Rs. 42-4-0 being the house-tax due for 1903-04.

Defendant contended that she was not liable as she purchased the house in the second half of the year and was actually put in possession only a few days before the end of the year. These facts were not denied.

The District Munsif held that the defendant was not liable for the first instalment and passed a decree in respect of the second instalment.

The plaintiff filed civil revision petition under section 25 of Act IX of 1887.

T. V. Seshagiri Ayyar for petitioner.

Kunjuni Nair for *K. Narayana Row* for respondent.

JUDGMENT.—This suit was brought for the recovery of the house-tax due to the Municipality of Nellore for the year 1903-04 in respect of the house which has been purchased by the defendant in the latter part of the second half of the said year. The District Munsif gave a decree for a moiety of the tax, that is, the second half-yearly instalment of it, but disallowed the claim for the first instalment. The question for determination is whether the disallowance is right.

There can be no doubt, as urged by Mr. Seshagiri Aiyar for the Municipal Councillors, that the tax in question was a *yearly* and not a half-yearly *tax*. This is made perfectly clear, from among other provisions, section 66 (1) which shows that the amount due for the whole year should be ascertained and entered in the register when, in pursuance of the sanction given by the Governor in Council to raise such tax in the municipality, the tax for the year is assessed. The circumstance that this tax is made payable in two equal half-yearly instalments, of course, does not, as contended for the defendant, make the amounts two distinct taxes or assessments absolutely independent of each other. In other words as soon as the assessment for the year is fixed, a liability for the same at once accrues though that liability may be discharged in instalments. This being so, were the Municipal Councillors disentitled to recover by suit from the defendant the part of the tax disallowed by the District Munsif? With reference to the provisions of section 110 to which some reference was made in the course of the argument, the defendant was obviously not a mere *occupier* of the house but an *owner*

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THE CHAIRMAN OF THE MUNICIPAL COUNCIL, NELLORE v. DWARAPALLY KOTTAMMA.

from the date of her purchase. The right of the Municipal Councillors, if any, to proceed against the defendant was only on the footing that she was an *owner*. Does the circumstance that her ownership arose after the assessment had been made and only in the course of the second half year, preclude the Municipal Councillors from recovering from her all the tax for the year remaining due at the date of the purchase? There is nothing so far as I can find in the provisions of the District Municipalities Act, that makes it compulsory on the part of the Councillors to apportion the tax for any particular year among persons in whom the ownership of a house may have resided during the period. Suppose, for instance, at the time of the assessment the house is the common property of certain persons, it would be impossible to hold that the tax is recoverable by the Council from each of such common owners only in proportion to their interest. It seems to me that the fact that the ownerships of more than one person are successive and not simultaneous, makes no difference in the right of the Council to proceed for the year's tax as against all or some of them leaving them to adjust their liabilities *inter se* by appropriate proceedings in case disputes arise between them in the matter. The provision of the Transfer of Property Act relied on, on behalf of the defendant, as to the liability of the seller to pay all public charges due up to the date of the passing of the property is not relevant as between the Municipal Councillors and the defendant.

I am, therefore, of opinion, that the decree of the lower Court, in so far as it disallowed the first instalment, is erroneous, and it will be modified by awarding that instalment also with costs throughout.

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PRIVY COUNCIL.

P.C.*
1907.
April 24, 25.
July 22.

VASUDEVA MUDALIAR AND OTHERS (DEFENDANTS),

v.

SRINIVASA PILLAI AND ANOTHER (PLAINTIFFS)

[On appeal from the High Court of Judicature at Madras.]

Limitation Act (*XV of* 1877), *sch. II, arts.* 132, 147—*Suit on mortgage bond to enforce payment of amount due by sale of mortgaged property—Suit on mortgage in English form for foreclosure or sale—Transfer of Property Act* (*IV o'* 1882), *ss.* 58, 88, 100.

A suit on a simple mortgage bond to enforce payment of the amount due on the bond by sale of the mortgaged property is governed by article 132 of schedule II of the Limitation Act (XV of 1877) and not by article 147.

The latter article is limited in its application to the one class of mortgages in which alone the suit can be, and always is, brought for foreclosure or sale, that is to mortgages in the English form.

APPEAL from a judgment and decree (13th March 1905) of the High Court at Madras which varied a judgment and decree (17th February 1902) of the Subordinate Judge of Negapatam.

The principal questions raised on this appeal were as to the rights of the parties to a deed of mortgage, and whether a suit to enforce those rights was barred by limitation.

The mortgage in suit was executed on 22nd September 188 by Vasudeva Mudaliar and Aiyappa Mudaliar, the first and third appellants in favour of one Krishna Mudaliar Avargal. The consideration therefor was a sum of Rs. 8,000 due on a previous mortgage, and the deed, which was in the usual form of a mortgage bond hypothecating immoveable property, provided (*inter alia*) that the principal sum should "bear interest at ¾ per cent. mensem and we shall pay the interest of each year by the 3 Panguni of that year and the principal at the rate of Rs. 1,000 annum from this date. In default of our paying the princi and interest as aforesaid, compound interest, calculated at ¾ cent. per mensem with 12 months rests from the date succeedi that of default on the aggregate principal and interest due

* *Present*: Lord ROBERTSON, Lord COLLINS, and Sir ARTHUR WILSON.

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then, and the principal amount shall, on demand by you, be paid by us without reference to the term."

Under these terms the first instalment of interest fell due on 11th April 1884: payment was not made and the suit out of which the present appeal arose was brought on 23rd September 1899. The plaintiff was the first respondent Srinivasa Pillai who sued in the character of Receiver in a suit brought in 1898 for partition of the property belonging to the mortgagees' family. On the partition being effected the mortgage deed in suit fell to the share of Sadagopa Mudaliar who was on 23rd February 1906 added as a respondent in the appeal.

The relief sued for was a decree for the amount due on the mortgage, and the recovery thereof by the sale of the property mortgaged. The plaint alleged that there had been a settlement of accounts on 14th October 1889 when Rs. 11,092-9-4 were admitted to be due; that subsequent to that date payment had been made on account of interest; and that in a suit for partition between the appellants an acknowledgment had been made of their liability on the mortgage to the extent of Rs. 16,000.

There were four defendants, Thiruvenkata Mudaliar, the son of Vasudeva Mudaliar, and Krishna Mudaliar, the minor son of Aiyappa Mudaliar, were made defendants in addition to the original mortgagors. The first defendant Vasudeva, and the third defendant Aiyappa pleaded that the suit was barred by limitation. They denied the settlement of accounts and payments as alleged, and urged that the stipulation as to compound interest ought not to be enforced. The second defendant contended that neither he nor his property was liable under the mortgage.

The only issue now material was, "Is the suit brought within time or is it barred against all or any of the defendants?"

The Subordinate Judge held that *primâ facie* the suit was barred by limitation, the period of limitation being 12 years from the first default. All the pleas put in to extend that period he held were not established. He was, however, of opinion that the debt being payable by instalments, the last five instalments from 22nd September 1887 were recoverable within 12 years from the date on which each of the said instalments fell due. He therefore made a decree for Rs. 5,000 the amount of the five instalments "and interest on each of these instalments, with interest thereon from the time each instalment fell due as per contract, and after

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VASUDEVA MUDALIAR v. SRINIVASA PILLAI.

term at contract rate of 12 annas per cent. per mensem up realization."

Both parties appealed to the High Court, and a Divis Bench of that Court (SUBRAHMANIA AYYAR and BENSON, JJ.) said:—

"Having regard to the formality of exhibit A (the mortgage deed in suit) and its terms we think it must be held to convey an interest in the property named in it, and to be therefore an instrument of mortgage as opposed to an instrument creating merely a charge within the meaning of the Transfer of Property Act. The period of limitation for the suit is therefore 60 years in accordance with the decision of the Full Bench in the case of *Narayana Ayyar* v. *Venkata Ramana Ayyar*(1). The suit is therefore not barred by limitation."

The High Court therefore varied the decree of the Subordinate Judge and gave the plaintiff a decree for Rs. 46,341-12-0 for principal and interest on the mortgage.

On this appeal,

DeGruyther for the appellants contended that the suit was governed by article 132 of schedule II of the Limitation Act (XV of 1877) which provided a period of 12 years from the date of the cause of action, and not by article 147 under which a period of 60 years was provided. The suit was therefore barred by lapse of time. The Limitation Act should be construed irrespectively of the definitions in the Transfer of Property Act (IV of 1882). That Act gave special definitions of "mortgage" and "charge" (see sections 58 and 100), but did not come into operation until five years after the present Limitation Act. Simple mortgages existed long before that Act (Macpherson on 'Mortgages,' page 14). Before the coming into operation of the Limitation Act of 1877 such a suit as the present was governed by article 132 of Act IX of 1871 which provided for 'suits for money charged upon immoveable property" a period of 12 years limitation, and though differently worded from article 132 of the present Act, had substantially the same meaning. There was nothing in Act IX of 1871 corresponding to article 147 of Act XV of 1877, enacting a period of 60 years for a suit by a mortgagee for foreclosure or sale: that was a new provision in 1877. There was not in Act IX of 1871 nor in Act XIV of 1859 which preceded it any provisions for suits for foreclosure. Foreclosure took place by

(1) I.L.R., 25 Mad., 220 at p. 238.

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virtue of legislative enactment on the expiry of the year of grace (see Regulation XVII of 1806) and a claim of that kind under a mortgage was treated as a suit for possession of immoveable property and was governed by clause 12 of section 1 of Act XIV of 1859, and later by article 132 of Act IX of 1871. Article 147 of Act XV of 1877, it was submitted, was enacted to apply to mortgages in the English form where foreclosure or sale was asked for, as to which there was no previous provision specially applicable and that article should be read distributively. Suits for money charged upon immoveable property were a well recognized class of suit to which article 132 of Act IX of 1871 was held to apply, and to which now article 132 of Act XV of 1877 was applicable. The Civil Procedure Code (Act X of 1877) passed in the same year as the present Limitation Act set out in form 109 of schedule IV a form of plaint applicable to a mortgage suit for foreclosure or sale. The High Courts have differed much in opinion since the passing of Act XV of 1877, and the introduction therein of article 147. It was submitted that the Calcutta High Court decisions showed the true construction which was that article 147 should not be extended to all suits in which a mortgagee sought a sale of the mortgaged property, but should apply only to mortgages in the English form in which the suit was always for foreclosure or sale; and that article 132 should be held applicable to suits for money for which immoveable property had been charged. In that view article 132 should be held to apply to the present suit. Reference was made to *Shib Lal* v. *Ganga Prasad*(1), *Girwar Singh* v *Thakur Narain Singh*(2), *Ram Din* v. *Kalka Prasad*(3), *Junesucar Dass* v. *Mahabeer Singh*(4), *Forbes* v. *Ameeroonissa Begum*(5), *Ganpat Pandurang* v. *Adarji Dadabhai*(6), *Surnomoyae* v. *Shooshee Mookhee Burmonia*(7), *Modun Mohun Chowdhry* v. *Ashad Ally Beparee*(8), *Ramachandra Rayaguru* v. *Modhu Padhi*(9), *Narayana Ayyar* v. *Venkataramana Ayyar*(10), and *Motiram* v. *Vitai*(11). On the evidence the issues as to the alleged settlement of accounts and

(1) I.L.R., 6 All., 552 at p. 554. (2) I.L.R., 14 Calc., 730.
(3) L.R., 12 I.A., 12; I.L.R., 7 All., 502.
(4) L.R., 3 I.A., 1; I.L.R., 1 Calc., 163.
(5) 10 M.I.A., 340. (6) I.L.R., 3 Bom., 312 at p. 330.
(7) 12 M.I.A., 244. (8) I.L.R., 10 Calc., 68.
(9) I.L.R., 21 Mad., 326. (10) I.L.R., 25 Mad., 220 at p. 238.
(11) I.L.R., 13 Bom., 90 at pp. 94, 96.

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acknowledgment of liability had been found in favour of the appellants and there was therefore no extension of the period of limitation.

If the claim was allowed compound interest should not be given as it amounted to a penalty; and interest from date of suit should only be at the rate of 6 per cent. per annum.

Cohen, K.C., and *Kenworthy Brown* for Sadagopa Mudaliar, the second respondent, contended that the period of limitation applicable to the suit was that enacted by article 147 of schedule II of Act XV of 1877, namely, 60 years, and therefore it was not barred. Article 147, it was submitted, was not limited to any particular class of mortgages, but applied to all suits in which foreclosure or sale was asked for, and not only to mortgages in the English form. The present suit was one in which the mortgagee asked for a decree for sale of the mortgaged property; therefore article 147 was applicable. This class of transaction was always considered a mortgage, not only since the Transfer of Property Act but previously. The only question now was whether the instrument sued upon was or was not a mortgage. For the answer to this the substantive law as to "mortgage" and "charge" in the Transfer of Property Act must be read into the Limitation Act: sections 58, 67, 69, 88 and 100 of the Transfer of Property Act were referred to. Clause (*b*) of section 58 showed the incidents of a mortgage. It was submitted that the instrument in suit was a mortgage within the meaning of section 58, clause (*b*), and not a mere transaction by which immoveable property was "made security for the payment of money." The latter class of cases is still governed by article 132. The present is the class of suit for which a form of plaint was prescribed in form 109, schedule IV of the Civil Procedure Code of 1877. Article 148 with form 110, Civil Procedure Code, would conform to it in the case of a suit by a mortgagor to redeem. Reference was made to *Forbes* v. *Ameeroonissa Begum*(1), *Ganpat Pandurang* v. *Adarji Dadabhai*(2), *Karan Singh* v. *Bakar Ali Khan*(3), *Shib Lal* v. *Ganga Prasad*(4), *Girwar Singh* v. *Thakur Narain Singh*(5), *Nilcomal Pramanick* v. *Kamini Koomar Basu*(6), *Kishan Lal* v.

(1) 10 M.I.A., 340.
(2) I.L.R., 3 Bom., 312 at p. 330.
(3) L.R., 9 I.A., 99; I.L.R., 5 All., 1 at p. 5.
(4) I.L.R., 6 All., 552 at p. 554.
(5) I.L.R., 14 Calc., 730.
(6) I.L.R., 20 Calc., 269.

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Ganga Ram(1), *Datto Dudheshvar* v. *Vithu*(2), *Ramachandra Rayaguru* v. *Modhu Padhi*(3), *Narayana Ayyar* v. *Venkataramana Ayyar*(4), and *Motiram* v. *Vitai*(5).

It was also contended that to make the cause of action arise on 22nd September 1884 when default was made in payment of the first instalment a demand was necessary, and *Hanmantram Sadhuram Pity* v. *Bowles*(6), and *Nettakaruppa Goundan* v. *Kumarasami Goundan*(7) were referred to. An acknowledgment of liability had also been made by the appellants, Act XV of 1877, section 19, *Maniram Seth* v. *Seth Rupchand*(8). Such an acknowledgment of debt was sufficient although not made by the person chargeable to the person entitled (*Moodie* v. *Bannister*(9)) a case under 3 & 4 Will. IV, c. 42.

As to the amount to be allowed for interest, under section 74 of the Contract Act (IX of 1872) the amount should be ascertained from the terms of the transaction (*Sundar Koer* v. *Rai Sham Krishen*(10)). In this case the interest agreed upon was not a penalty (*Clydebank Engineering and Shipbuilding Company* v. *Donjose Ramos Yzguierdoy Castaneda*(11).

DeGruyther replied.

22nd July 1907.—The judgment of their Lordships was delivered by Sir ARTHUR WILSON.

JUDGMENT.—This is an appeal from a judgment and decree of the High Court of Madras, dated the 13th March 1905, modifying those of the Subordinate Judge of Negapatam, of the 17th February 1902.

The controversy arises out of a mortgage executed on the 22nd September 1883 by the first and third appellants in favour of Kishna Mudaliar Avergal, to secure Rs. 8,000 and interest as stipulated. The mortgage was of the kind long known as a mortgage bond or hypothecation bond, and now described in the Transfer of Property Act as a simple mortgage.

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(1) I.L.R., 13 All., 28 at pp. 41, 42.
(2) I.L.R., 20 Bom., 408 at pp. 413, 418.
(3) I.L.R., 21 Mad., 326.
(4) I.L.R., 25 Mad., 220.
(5) I.L.R., 13 Bom., 90 at pp. 94, 96.
(6) I.L.R., 8 Bom., 561 at p. 566.
(7) I.L.R., 22 Mad., 20.
(8) L.R., 33 I.A., 165; I.L.R., 33 Calc., 1047.
(9) (1865), 4 Drew., 432.
(10) L.R., 34 I.A., 9 at pp. 17, 18; I.L.R., 34 Calc., 150 at p. 147.
(11) 1905, L.R.A.C., 6 at pp. 10, 12.

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In the course of a partition suit, relating to the estate of the mortgagee, the first respondent was appointed Receiver of that estate, and as such he instituted the present suit, joining as defendants the two actual mortgagors and their respective sons, which four persons are now the appellants. The object of the suit, so far as it need now be noticed, was to enforce payment of the amount due under the mortgage, by sale of the mortgaged property.

In carrying out the partition the claim now in question was allotted to the now second respondent, whereby he became the person really interested in the claim. Accordingly he was made a party to this appeal, by order of the High Court, and he is the contesting respondent.

The only issue in the case which need be noticed was whether the suit was barred by limitation, and the principal question discussed on the argument of this appeal (the only one on which their Lordships propose to express an opinion) is whether the period of limitation applicable to such a case is sixty years, under article 147 in the second schedule to the Indian Limitation Act (XV of 1877), as held by the High Court, or twelve years, under article 132, as contended for by the appellants.

This question is one as to which there has been great diversity of opinion among the several High Courts in India for many years past, almost from the time of the passing of the Act of 1877. If there had been a uniform current of decision in India upon such an Act and for such a period of time, their Lordships would have been very slow to interfere. But though the Act to be construed is one applicable to India generally, and must bear the same meaning everywhere, different and conflicting views have so far prevailed in the different provinces of India. Their Lordships have therefore no alternative but to decide between the conflicting opinions.

The two articles in question run thus:—Article 132. Suit "to enforce payment of money charged upon immoveable property," "twelve years." Article 147. Suit "by a mortgagee for foreclosure or sale," "sixty years."

Before balancing the two views which have been taken of the effect of those articles, it may be well to see how the law stood when they were passed. The previous Act was Act IX of 1871, in which article 132, referring to suits "for money charged upon

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immoveable property," was practically the same as the present article bearing that number. There was nothing corresponding to article 147. Under that state of things it was perfectly settled law that suits of the present class were governed by article 132, whilst some uncertainty had been felt as to the rule of limitation applicable to another class of mortgage, the English mortgage.

The two views taken under the Act of 1877 are these: According to one view, article 147 applies to every suit by a mortgagee, in which he asks either for foreclosure or for sale. According to the other view, article 147 applies only to the class of mortgages (English mortgages) in which the suit may be, and in fact always is, brought for "foreclosure or sale," while article 132 means what the corresponding article meant before.

In support of the first of these constructions, reliance has mainly been placed upon the view that the terms of article 147 require its acceptance, and that the other construction is not a legitimate construction, as not giving fair effect to the language used. If this be so, it is of course conclusive. But their Lordships think it is not so. They are of opinion that the narrower construction of article 147, limiting its application to the one class of mortgages in which alone the suit can be, and always is, brought for "foreclosure or sale," is a legitimate construction, and gives reasonable effect to the language used.

That being so, their Lordships think that the reasons for adopting the narrower interpretation of article 147 greatly outweigh those on the other side. The preponderating considerations, in their Lordships' opinion, are the following. The narrower construction escapes the necessity of attributing to the Legislature a great and sudden change of policy. It also gives effect to the ordinary presumption, that the Legislature, when it repeats in substance in a later Act an earlier enactment, that has obtained a settled meaning by judicial construction, intends the words to mean what they meant before. The other construction fails in both these particulars.

One argument urged for the respondent calls for notice. It was said that, whatever might have been the original operation of the Limitation Act of 1877, the effect of article 147 might be extended by the subsequent passing of the Transfer of Property Act in 1882, so as to make the article apply to everything which was declared to be a mortgage by the later Act. This contention

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VASUDEVA MUDALIAR v. SRINIVASA PILLAI.

appears to their Lordships to assume the very point in controversy, namely, that article 147 purports to apply to every suit on a mortgage, in which there is claim for foreclosure or for sale.

Their Lordships will humbly advise His Majesty that it should be declared that article 132 is the article which provides the rule of limitation applicable to this case, and that the case should be remitted to the High Court to be disposed of in accordance with this declaration.

The second respondent will pay the costs of this appeal.

Solicitor for the appellants: *Douglas Grant.*

Solicitors for the second respondent: *Lawford, Waterhouse & Lawford.*

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Subrahmania Ayyar, Mr. Justice Benson and Mr. Justice Wallis.

1906. December 17. 1907. January 31.

PINGALA LAKSHMIPATHI AND OTHERS (DEFENDANTS Nos. 2 TO 4), APPELLANTS,

v.

BOMMIREDDIPALLI CHALAMAYYA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Inam—Madras Enfranchised Inams Act—Act IV of 1866—Service inam enfranchised in widow's name under Act IV of 1866 not alienable by widow beyond her own life-time.

The enfranchisement of a service inam does not involve a resumption by Government and a fresh grant in favour of the persons named in the title-deed. It disannexes the inam from the office, converts it into ordinary property and releases the reversionary rights of the Crown in the inam but does not confer on the persons named in the title-deed any right in derogation of those possessed by other persons in the inam at the time of the enfranchisement.

Case law considered.

Narayana v. *Chengalamma*, (I.L.R., 10 Mad., 1), approved.

Gunnaiyan v. *Kamakchi Ayyar*, (I.L.R., 26 Mad., 339), approved.

A Hindu widow cannot alienate beyond her own life-time service inam enfranchised in her name under Madras Act IV of 1866.

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* Second Appeal No. 845 of 1904, presented against the decree of M.R.Ry. T. Varada Row, Additional Subordinate Judge of Godavari at Rajahmundry, in Appeal Suit No. 289 of 1903, presented against the decree of M.R.Ry. T. A. Narasimhachariar, District Munsif of Bhimavarum, in Original Suit No. 91 of 1902.

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PINGALA LAKSHMIPATHI v. BOMMIREDDIPALLI CHALAMAYYA.

SUIT to recover land.

The plaintiffs alleged that they were the senior uncle's sons of one Achanna, the last male owner of the properties in suit, and as such, the nearest reversioners; that Achanna died thirty years ago; that on his death his properties were inherited by Subbamma, his mother; that Subbamma died on the 3rd December 1901; and that the property had been wrongly disposed of by Subbamma and her daughter in favour of the defendants.

Defendants Nos. 2 to 4 alleged that the properties comprised in items 8, 9, 10, 11 and 13 were Karnam Mirasi lands; that they were enfranchised in the name of Subbamma and therefore became her absolute property; and that she had disposed of the property by will in favour of the fourth defendant.

The District Munsif upheld the contention of defendants Nos. 2 to 4 and dismissed the suit in respect of the items claimed by them.

On appeal, the Subordinate Judge held, on the authority of *Gunnaiyan* v. *Kamakshi Ayyar*(1), that the widow's interest was not altered by the enfranchisement, and, reversing the decree so far as it upheld claim of defendants Nos. 2 to 4, remanded the suit for retrial. Defendants Nos. 2 to 4 appealed to the High Court. The case came, in the first instance, before (Sir Arnold White, C.J., and Wallis, J.,) who made the following

ORDER OF REFERENCE TO A FULL BENCH.—There are conflicting decisions, as pointed out in the judgment of the lower Appellate Court, upon the question raised in this appeal, viz., whether a Hindu widow can alienate beyond her own life-time service inams enfranchised in her name under Madras Act IV of 1866.

The decisions are referred to in paragraph 3 of the judgment of the lower Appellate Court. To them may be added *Subbaraya Mudali* v. *Kamu Chetty*(2).

We accordingly refer the question to a Full Bench for decision.

The appeal came on for hearing in due course before the Full Bench constituted as above.

T. V. Muthukrishna Aiyar for *T. V. Seshagiri Ayyar* for appellants.

K. Kuppusawmi Ayyar for respondents.

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(1) I.L.R., 26 Mad., 339. (2) I.L.R., 23 Mad., 47.

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PINGALA LAKSHMIPATHI v. BOMMIREDDIPALLI CHALAMAYYA.

The Court expressed the following

OPINION.—In this case the inam title-deed issued in 1872 was not, so far as the land sued for is concerned, made out in favour of the widow (Subbamma) only, but also in favour of the next reversioner (Chelamayya), the first plaintiff. In no view therefore could the widow have been constituted by the grant absolute owner of the whole property.

Having regard, however, to the conflict of decisions as to the effect of inam title-deeds issued in the case of village service inams on enfranchisement, we have heard the case argued without reference to the fact that the title-deed in this case contains the names of both the widow and the reversioner.

The decisions are numerous, commencing with that of *Bada* v. *Hussu Bhai*(1) and ending with *Gunnaiyan* v. *Kamakshi Ayyar*(2). The decision in the case of *Venkata* v. *Rama*(3), was no doubt that of a Full Bench, but the Judges delivered separate judgments from which it is difficult to gather any definite principle common to the majority applicable to the construction of the title-deeds issued in such cases. There are undoubtedly observations in the judgments of the learned Chief Justice and of Brandt, J., which go strongly to support the view that enfranchisement involved a resumption of the inam by Government and a fresh grant in favour of the persons named in the title-deed. In deference to these *dicta*, that view has been adopted in several subsequent decisions of the Court among which may be mentioned the cases of *Venkatarayadu* v. *Venkataramayya*(4), *Dharanipragada Durgamma* v. *Kadambari Virrazu*(5) and *Subbaraya Mudali* v. *Kamu Chetty*(6). On the other hand in the case of *Narayana* v. *Chengalamma*(7), an altogether different view was taken as to the effect of enfranchisement of service inams, and this view has been strongly supported by Bhashyam Ayyangar, J., in an elaborate judgment in *Gunnaiyan* v. *Kamakchi Ayyar*(2). Shortly stated, this view is that the enfranchisement disannexes the inam from the office, converts it into ordinary property, and releases the reversionary rights of the Crown in the inam, but that it does not confer on the persons named in the title-deed any

(1) I.L.R., 7 Mad., 236.
(2) I.L.R., 26 Mad., 339.
(3) I.L.R., 8 Mad., 249.
(4) I.L.R., 15 Mad., 284.
(5) I.L.R., 21 Mad., 47.
(6) I.L.R., 23 Mad., 47.
(7) I.L.R., 10 Mad., 1.

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PINGALA LAKSHMIPATHI v. BOMMIREDDIPALLI CHALAMAYYA.

right in derogation of those possessed by other persons in the inam at the time of the enfranchisement. On full consideration we are of opinion that this is the right conclusion.

The terms of Madras Act VIII of 1869, which was not referred to in any of the reported cases in connection with village service inams, are almost decisive. Section 1 of that Act provides that nothing in any inam title-deed shall be deemed to affect the interests of any person other than the inam-holder named in the title-deed. This provision, no doubt, applies expressly to deeds issued before the passing of the Act, but the Act goes on to provide that nothing contained in Madras Act IV of 1866, under which the title-deed in the present case was issued, shall be deemed to confer on any inam-holder any right to land which he would not otherwise possess. It is thus obvious that the principle to be applied to the construction of title-deeds issued subsequent to the Act, is that expressly laid down by the Act as applicable to title-deeds issued prior to the Act.

We accordingly answer the question referred to us by stating that a Hindu widow cannot alienate beyond her own life-time a service inam enfranchised in her name under Madras Act IV of 1866 except in cases of necessity authorized by the Hindu Law applicable to ordinary property held by her as a widow.

The case came on for final hearing before (Sir Arnold White, C.J., and Wallis, J.) when the Court delivered the following

JUDGMENT.—In accordance with the decision of Full Bench this second appeal is dismissed with costs.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1907. April 8, 9.

SESHAGIRI ROW (PLAINTIFF), APPELLANT,

v.

NAWAB ASKUR JUNG AFTAL DOWLAH MUSHRAL MULK (DEFENDANT), RESPONDENT.*

Letters Patent, cl. 12—Considerations of convenience may be taken into account in granting or refusing leave when part of the cause of action arises within jurisdiction—When part of cause of action arises.

The jurisdiction conferred by clause 12 of the Letters Patent in respect of applications for leave to sue, when part of the cause of action arises within jurisdiction ought to be exercised with great caution when the defendant is an absent foreigner.

Societe Generale De Paris v. *Dreyfus Brothers*, (29 Ch.D., 239 at 243), referred to.

Courts in this country are not precluded from taking the question of convenience into consideration in dealing with applications under clause 12 for leave to sue.

Part of the cause of action cannot be held to arise at a place, where payment was not originally contracted for merely because after performance of the contract and without any consideration, a promise is made to pay at such place.

SUIT for money alleged to be due to plaintiff for services rendered to the defendant who is an absent foreigner resident at Hyderabad. The services were rendered in Hyderabad. A previous suit in the High Court brought without leave by the plaintiff in respect of the same cause of action was dismissed on the ground that the whole cause of action did not arise within jurisdiction. In his present plaint the plaintiff alleges that subsequent to the dismissal of that suit he saw the defendant at Hyderabad and defendant promised to pay him at Madras. The plaintiff applied for leave under clause 12 of the Letters Patent to file the suit in Madras. Defendant objected, *inter alia*, that his witnesses were resident at Hyderabad and that their attendance cannot be enforced at Madras and that he would be seriously prejudiced thereby.

Moore, J., rejected the application.

Plaintiff appealed.

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* Original Side Appeal No. 76 of 1906, presented against the order of Mr. Justice Moore, dated 6th April 1904, in the Ordinary Original Civil Jurisdiction of the High Court.

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SESHAGIRI ROW v. NAWAB ASKUR JUNG AFTAL DOWLAH MUSHRAL MULK.

K. Naraina Row for appellant.

Mr. *K. Ramanadha Shenai* for respondent.

JUDGMENT.—In the special circumstances of this case in connection with the delay in the re-presentation of the appeal, we think it should be admitted and heard, notwithstanding the delay.

This is an appeal from the order of Moore, J., dismissing an application under article 12 of the Letters Patent for leave to institute a suit in this Court. The order of the learned Judge is in these terms:—"I do not consider that this is a case in which leave to sue should be given. It is admitted that the defendant lives in Hyderabad and that all the services that the plaintiff alleges he performed on behalf of the defendant for a period ranging over several years, were performed in the Hyderabad territories. Such being the case, it is absolutely certain that the great mass of the witnesses whom the Court would have to examine must be residents in Hyderabad. From these facts, it follows that the balance of convenience must be strongly in favour of the suit being tried in Hyderabad. Application for leave to sue dismissed with taxed costs."

It must be taken that the learned Judge dealt with the case on the assumption that the cause of action arose in part within the local limits of the ordinary original jurisdiction of this Court. Mr. Narayana Rau argued on behalf of the appellant that the learned Judge dismissed the application on a ground which it was not open to him to consider in deciding whether leave should or should not be given, and that he failed to exercise a judicial discretion in dismissing the application.

Having regard to the wording of article 12, it is clear that the fact that the cause of action arises in part within the local limits is not conclusive, and that, notwithstanding that the cause of action arises in part within the local limits, the Court may decline to give leave to sue.

So far as the law of England is concerned, there may be some doubt as to the extent to which in dealing with applications under Order XI of the Rules of the Supreme Court for leave to serve a writ or notice of a writ, out of the jurisdiction, the Court will have regard to the doctrine of *forum conveniens* (see *Logan* v. *Bank of Scotland*(1)), but there is certainly nothing in the judgment in that case to suggest that no regard should be had to this question.

(1) (1906) 1 K.B., 141.

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SESHAGIRI ROW v. NAWAB ASKUR JUNG AFTAL DOWLAH MUSHRAL MULK.

As regards *Robey & Co.* v. *The Snaefell Mining Company, Limited*(1) all the Court there held was that, in that particular case, the plaintff was entitled to proceed in the Court which was the more convenient to him.

As regards the law of this country, so far as we are aware, it has never been held that the question of convenience is not a question which may be taken into consideration in dealing with applications under article 12, and we are certainly not prepared to hold that this question should be excluded from consideration.

In the present case, the defendant is a non-resident foreigner, and although the jurisdiction conferred by article 12 extends to suits against non-resident foreigners (*Shamanna* v. *Venkatavarada Ayyangar*(2)), we think that the rule applied in England in the case of applications under the Rules of the Supreme Court, Order XI (see *Societe Generale De Paris* v. *Dreyfus Brothers*(3)) should be applied here in applications under article 12, and that the jurisdiction should be exercised with caution.

Further, although the learned Judge appears to have proceeded on the assumption that the cause of action arose in part within the local limits, in our view, neither the affidavit in support of the application for leave to sue, nor the intended plaint contains allegations which show *primâ facie* that the cause of action arose in part within the local limits. According to the allegations the considerations for the sum claimed was work done and services rendered in Hyderabad from 1886 to November 1899. It cannot be said to have been part of the original contract that payment should be made in Madras. There is an allegation of a promise, after the work had been done, to pay in Madras. There is no allegation of any consideration for this promise, and it is not a promise to compensate a person who has already voluntarily done something for the promisor within the meaning of section 25 (2) of the Indian Contract Act. For the purposes of the application under article 12, we think it must be held that as there was no allegation of a legal contract to make the payment within the jurisdiction, there was no breach within the jurisdiction, and the cause of action did not arise in part within the jurisdiction.

Messrs. *Short & Bewes*—attorneys for respondent.

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(1) 20 Q.B.D., 152. (2) I.L.R., 29 Mad., 239.
(3) 29 Ch.D., 239 at p. 243.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

SUBRAMANIAN CHETTY (PLAINTIFF), APPELLANT,

1907. April 9, 10, 24.

v.

ALAGAPPA CHETTY AND OTHERS (DEFENDANTS NOS 1 TO 3), RESPONDENTS.*

Negotiable Instruments Act—Act XXVI of 1881, *ss.* 8, 78—*Right of indorser indorsing for collection—Indorser on regaining possession of bill, may strike out name of indorsee and himself sue on the bill.*

The holder of a negotiable instrument within the meaning of section 8 of the Negotiable Instruments Act, to whom payment must be made under section 78 of the Act, is the person who, *on the face of such instrument is entitled in his own name* to the possession thereof and to receive or recover the amount due therefor from the parties thereto.

Subba Narayana Vathiar v. *Ramaswamy Aiyar*, (I.L.R., 30 Mad., 93), referred to.

Where the drawer or indorser takes up a bill by paying the holder, he is entitled to strike out subsequent parties and maintain a suit on such bill against the parties antecedent to himself.

Where a bill is indorsed for collection and is returned by the indorsee to the indorser, the former ceases to be the holder within the meaning of section 8 of the Act, and the latter can maintain a suit on the bill by striking out the name of the indorsee.

English and American cases on the subject considered.

SUIT to recover the amount due on a hundi drawn by the first defendant in favour of second defendant's father, who endorsed it to plaintiff. The plaintiff had endorsed the same to one V. One of the contentions raised in the case was that V and not the plaintiff was the holder entitled to recover the amount under sections 8 and 78 of the Negotiable Instruments Act. V was examined and stated that he was only an agent for collection and on the first defendant dishonouring the hundi, he returned it to plaintiff.

The Sub-Judge held that under the circumstances the plaintiff was the holder entitled to sue and gave judgment accordingly.

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* Second Appeal No. 863 of 1904, presented against the decree of H. Moberly, Esq., District Judge of Madura, in Appeal Suit No. 495 of 1904, presented against the decree of M.R.Ry. W. Gopalachariar, Subordinate Judge of Madura (East), in Original Suit No. 61 of 1902.

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SUBRAMANIAN CHETTY v. ALAGAPPA CHETTY.

The District Judge on appeal held that V was the pe entitled as holder and dismissed the suit.

Plaintiff appealed.

The Hon. Sir *V. Bhashyam Ayyangar*, *V. Krishnaswa Ayyar* and *T. V. Gopalaswami Mudaliar* for appellant.

K. N. Aiya for first respondent.

JUDGMENT.—This is a suit on a hundi. The plaint alleg that the first defendant, the father of the second defendant, a others after carrying on business at Penang under the style S.T.A.L. returned to India, leaving money of the firm in t hands of agents at Penang; that after their return the fi defendant on behalf of the firm drew a hundi on the agent Penang in favour of the father of the second defendant for h share of the money at Penang; that the father of the seco defendant indorsed the hundi for consideration to the plainti that the plaintiff sent the hundi to one Venkatachellam, his age at Penang, for collection, and that the hundi was returne dishonoured.

The plaintiff succeeded in the Court of First Instance but t lower Appellate Court dismissed the suit on the ground that t plaintiff having indorsed the hundi to Venkatachellam is n entitled to maintain the suit. For the appellant it was n disputed that the payment must be made to the holder in accordan with section 78 of the Negotiable Instruments Act, and that t holder as defined in section 8 means any person entitled in h own name to the possession thereof and to receive or recover t amount due therefor from the parties thereto; that is to say, t person so entitled on the face of the bill (*Subba Narayana Vathiar* v *Ramaswamy Aiyar*(1)), but it was contended that the indorseme by the plaintiff to Venkatachellam having been merely f purposes of collection, and the bill having been returned b Venkatachellam to the plaintiff after dishonour, the plaintiff wa under the circumstances entitled to strike out his indorsement t Venkatachellam, thus making himself as last indorsee the holde within the meaning of section 8, and consequently the perso entitled to receive payment and to sue. The Act contains n provision as to striking out indorsements, but there can we thin be no doubt that as held in *Marimuthu Pillai* v. *Krishnasamy*

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(1) I.L.R., 30 Mad., 88 at p. 93.

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Chetti(1) and *Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar*(2), and as expressly provided in section 59 (2) of the English Bills of Exchange Act when a drawer or indorser takes up a bill by paying the holder he is entitled to maintain a suit on the bill against the parties antecedent to himself and to strike out subsequent parties who by reason of his payment have ceased to have any right or liabilities under the bill. By such a payment he has always been considered to acquire a fresh cause of action being subrogated to the holder as regards all parties antecedent to himself. The English authorities are not so clear about the right of an indorser to an indorsee for collection on regaining possession of the bill to strike out the name of such indorsee and the Bills of Exchange Act does not expressly deal with the point. There is however some English authority for holding that the indorser in such a case may sell himself (*Stones* v. *Butt*(3)), Byles on 'Bills' 16th edition, page 405; and Chitty 'Bills of Exchange,' 11th edition, page 374, where the right of striking out subsequent parties is stated in terms wide enough to cover the present case; Chalmers' 'Bills of Exchange,' 6th edition, page 114. In America the right of the indorser to strike out the name of the indorsee for collection is well established. Stony on 'Promissory Notes,' page 452, and *Dugan* v. *The United States*(4), which were cited with approval in *Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar*(2), where however the present question did not arise for decision. It must also be borne in mind that an indorsement for collection does not, as between the indorser and indorsee, pass the property in the bill to the indorsee, though it puts him in a position to make title for a subsequent holder in due course. See section 46 of the Negotiable Instruments Act and *Lloyd* v. *Howard*(5), and that an indorsee for collection after returning the bill to his indorser does not come within the definition of holder in section 8 so as to be entitled to sue. On the whole, we think the balance of authority and convenience is in favour of allowing the indorser to sue in such case. We, therefore, set aside the decree of the District Judge and remand the case to him for disposal according to law. Costs will abide the result.

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(1) I.L.R., 17 Mad., 197.
(2) I.L.R., 28 Mad., 544.
(3) 2 C. & M., 416.
(4) 3 Wheaton, 172.
(5) 15 Q.B., 995.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. April 10, 11, 15.

VENKATACHALAPATHI AYYAR (DEFENDANT), APPELLANT IN S.A. No. 115 OF 1906,

PADMIAH CHETTY (SECOND DEFENDANT), APPELLANT IN S.A. No. 116 OF 1906,

v.

ROBERT FISCHER (PLAINTIFF IN BOTH), RESPONDENT IN BOTH.*

Rent Recovery Act (Madras)—Act VIII of 1865, *ss.* 38 *and* 39*—Sale on excessive demand illegal—Institution of civil suit for rent after taking summary proceedings no bar to proceeding with the latter—Limitation Act, Act XV of* 1877, *sch. II, art.* 12*—No bar to defendant in possession pleading invalidity of sale.*

Where notice of demand by the landlord under section 39 of the Rent Recovery Act, claims a larger amount than is legally due from the tenant, a sale under the Act by the landlord for non-compliance with such excessive demand is illegal, and no subsequent alteration of the amount to the proper figure can validate such sale.

Pichuvayengar v. *Oliver*, (I.L.R., 26 Mad., 261), followed.

Where the landlord institutes a civil suit for the rent after taking proceedings under the Act, such proceedings, if pleaded by defendant, will be a valid defence to the suit; but *semble* the mere institution of the suit will not make it illegal to proceed further with the summary proceedings. If the suit is allowed to proceed to judgment, the debt will merge in the decree and further summary proceedings will be illegal, but a sale before judgment will be valid.

Chancellor v. *Webster*, (9 T.L.R., 568), referred to.

A defendant in possession whose right to sue to set aside a sale is barred by article 12 of schedule II of the Limitation Act, may set up the invalidity of such sale as a defence.

Lakshmi Doss v. *Roop Laul*, (I.L.R., 30 Mad., 169), referred to.

SUIT for possession of land.

The plaintiff was mortgagee with possession of the Salem zamindari and the defendant was a ryot. For the rent due from the defendant for fasli 1309, the plaintiff took proceedings under Madras Act VIII of 1865 and brought the plaint lands belonging to defendant to sale and plaintiff purchased the same on 18th June 1902. The defendant having refused to give up possession, plaintiff instituted this suit on 30th November 1903.

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* Second Appeals Nos. 115 and 116 of 1906, presented against the decrees of M.R.Ry. S. Gopalachariar, District Judge of Salem, in Appeal Suits Nos. 10 and 11 of 1905, presented against the decrees of M.R.Ry. S. Dorasami Ayyar, Principal District Munsif of Salem, in Original Suits Nos. 364 of 1903 and 55 of 1904.

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VENKATA-CHALAPATHI AYYAR, ETC. v. ROBERT FISCHER.

The plaintiff, in his notice of demand to defendant prior to sale, stated that Rs. 8 was due for rent, whereas only Rs. 5 was due.

For recovery of the arrears for fasli 1309, the plaintiff had, prior to the sale, instituted Small Cause No. 136 of 1902, and the decree in the suit given on the 19th June 1902 (*i.e.*), the day after the sale, expressly held that almost all the arrear was paid and that only a trifling balance was due to plaintiff.

The District Munsif held that the sale was irregular and that the plaintiff having instituted a civil suit was bound to wait till its disposal without bringing the property to sale. He dismissed the plaintiff's suit.

The District Judge, on appeal, held that the defendant, not having sued within one year to set aside the sale, was barred from setting up its invalidity and reversing the decree, he decreed for possession in favour of plaintiff.

The defendant appealed.

T. Subrahmania Ayyar for appellant.

T. V. Seshagiri Ayyar for *T. Rangachariar* for respondent.

JUDGMENT.—In these cases the plaintiff who is the usufructuary mortgagee of the Salem Mitta summarily attached and brought to sale the holdings of the defendants for arrears of rent due for fasli 1309 and himself purchased the holdings for 5 annas. He now sues as purchaser to recover possession of the holdings from the defendants. The District Munsif dismissed the suits, but the District Judge reversed his decrees and gave judgment for the plaintiff on the ground that as the defendants had not brought a suit within one year to set aside the summary sale, and as such a suit was barred by article 12 of the Limitation Act, it was not now open to the defendants in the present suits to question the validity of the sale. This ruling is opposed to the decision of this Court on precisely the same facts in Second Appeal No. 719 of 1904 (unreported); it is also opposed to the recent Full Bench ruling in *Lakshmi Doss* v. *Roop Laul*(1) and must, we think, be set aside.

The defendants contend that the summary sale under which the plaintiff claims was bad among other reasons, because subsequently to the attachment under section 38 of the Rent Recovery Act for arrears of rent due for fasli 1309 and while the

(1) I.L.R., 30 Mad., 169.

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VENKATA-CHALAPATHI AYYAR, ETC. v. ROBERT FISCHER.

summary proceedings were pending, the plaintiff instituted a civil suit for the recovery of the same arrears. We are unable to agree with this contention on the facts of the present case. It would, we think, have been a good answer to the civil suit to plead that summary proceedings were pending, according to the decision in *Lehain* v. *Philpott*(1) that when a landlord distrains for rent and does not sell the goods, he cannot bring an action for the rent so long as he holds the distress, though it be insufficient to satisfy the rent. There is, however, no authority for the proposition that the mere institution of the civil suit makes it illegal to proceed further with the summary proceedings then pending, although it may be that, if the defendant does not plead the summary proceedings in answer to the civil suit but allows it to proceed to judgment, the debt will merge in the decree and further summary proceedings become illegal (*Chancellor* v. *Webster*(2)). That, however, is not the present case, as here the summary sale took place before judgment was given in the civil suit. This defence must therefore be rejected.

Various other defences are raised, but it is only necessary to consider one of them, that the demand was in excess of the rent due by the tenant. Taking the rent due to be that fixed by the Revenue Court in a suit to enforce acceptance of a pattah for the fasli, it is admitted that, in the notice of demand presented under section 39 of the Rent Recovery Act, the landlord omitted to give credit for a payment which had been made by the tenant on account of the rent of the fasli, and that consequently the demand was excessive. The sale having been made in consequence of non-compliance with an excessive demand is illegal according to the decision in *Pichuvayengar* v. *Oliver*(3) and cannot be relied on by the plaintiff. It is, we think, immaterial that, at the time of sale, credit was given for the payment by the tenant, as, for the purpose of the present objection, it is the demand on the tenant which must be looked to. It is unnecessary to consider the other defences, and we must allow the appeals, reverse the decrees of the District Judge and restore those of the District Munsif with costs in this and the lower Appellate Court.

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(1) L.R., 10 Ex., 242. (2) 9 T.L.R., 568.
(3) I.L.R., 26 Mad., 261.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Miller.

YUSUF SAHIB (FIRST DEFENDANT), APPELLANT,

v.

DURGI AND OTHERS (FIRST TO FIFTH PLAINTIFFS AND SECOND DEFENDANT), RESPONDENTS.*

1907. March 1. April 22, 23, 25.

Res judicata—*Decision in previous suit binding as* res judicata *between the co-defendants if the matter in issue in the subsequent suit actively contested at previous trial.*

A decision in a previous suit on a matter raised and actively contested between co-defendants in such suit will operate as *res judicata* in a subsequent suit in which such co-defendants are arranged as plaintiff and defendant.

Kandiyil Cheriya Chandu v. *The Zamorin of Calicut,* (I.L.R., 29 Mad., 515), followed.

The fact that the defendant in the previous suit had no right of appealing against the decision because the suit was dismissed, will not affect the operation of the bar, when such defendant having the right to be joined as a plaintiff chose to contest the suit as a co-defendant.

The Full Bench decision in *Somasundara Mudali* v. *Kulandai Velu Pillai,* (I.L.R., 28 Mad., 457), is not in conflict with *Kandiyil Cheriya Chandu* v. *The Zamorin of Calicut,* (I.L.R., 29 Mad., 515).

Where a decision dismissing a suit is in fact wholly against the defendant, such defendant can appeal against it.

Krishna Chandra v. *Mohish Chandra Saha,* (9 C.W.N., 584), approved.

THE facts necessary for the report are set out in the judgment.

K. P. Madhava Rau and *K. S. Ramaswami Sastri* for appellant.

Mr. *K. Ramanadha Shenai* and *K. U. Shama Rau* for first to fifth respondents.

JUDGMENT.—The facts of this case briefly stated are the following.

One Yusuf obtained in Original Suit No. 400 of 1900 an *ex-parte* money decree against Timma as yejaman of an Aliyasantana family. Then Timma sued the other members of his family in

* Second Appeal No. 1200 of 1904, presented against the decree of P. J. Itteyerah, Esq., Subordinate Judge of South Canara, in Appeal Suit No. 3 of 1903, presented against the decree of M.R.Ry. M. Dewa Rau, District Munsif of Udipi, in Original Suit No. 175 of 1902.

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YUSUF SAHIB v. DURGI.

Original Suit No. 486 of 1900 for a declaration that the family property was liable for the payment of certain debts incurred by him including that due to Yusuf; to this suit Yusuf and other creditors were made parties (defendants) and the suit was dismissed, Timma being ordered to pay the costs of the creditor-defendants. Yusuf after this attached certain immoveable property of the family in execution of his *ex-parte* decree against Timma, the other members of Timma's family presented a claim under section 279, Civil Procedure Code, which was dismissed and they then instituted the present suit against Yusuf and Timma for a declaration that the attached property is not liable to be sold. The Courts below have decided that the decision in Original Suit No. 486 of 1900 is binding on Yusuf and have made the declaration prayed for.

Yusuf appeals.

On his behalf it was contended first, that the family of Timma were represented by him in Original Suit No. 400 of 1900 and that they could not legally prefer a claim under section 279, Civil Procedure Code, but should have raised their contention by application under section 244, Civil Procedure Code. This is an entirely new contention raised for the first time in the argument in second appeal, and we are not prepared to admit it in the circumstances.

Next it was contended that the decree in Original Suit No. 400 of 1900 is binding on the family, being obtained against the yejaman, and can only be impeached on the ground of fraud or collusion. We think it was open to the family to show as was shown in this suit to the satisfaction of the District Munsif, that the judgment-debtor did not represent the family when the debt was incurred, but the question does not really require our decision because we hold on the remaining question, that Yusuf is bound by the decree in Original Suit No. 486 of 1900.

The object of that suit was to determine whether the family property is liable for Yusuf's debt among others. Yusuf was made a defendant obviously in order that he might be bound by the declaration if made, he contested the suit putting forward his decree against the yejaman, and alleging the liability of the family properties: his interest in the suit was in fact identical with that of the plaintiff: he was represented by pleader and if he did not call evidence on his own account we cannot assume that that was

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because he did not care to take an active part in the controversy: it was open to him to supplement the evidence adduced by Timma if he could. So far the case is not distinguishable from the case of *Kandiyil Cheriya Chandu* v. *The Zamorin of Calicut*(1) where the sixth defendant was held bound by the findings in the suit which was dismissed. For the appellant an attempt is made to distinguish that case on the ground that these appeals were preferred (apparently by the plaintiff) while here Yusuf had no right to appeal, and plaintiff did not do so. We are inclined to take the view of Woodroffe, J., in *Krishna Chandra* v. *Mohish Chandra Saha*(2), and to hold that Yusuf had a right to appeal, the decree dismissing the suit being so far as he was concerned wholly against him except in regard to the immaterial question of costs.

Muttukumarappa v. *Arumuga*(3) was a case in which the decree was in favour of the tenant who was not allowed to appeal against a particular issue and is not in point here. But assuming that Yusuf had no right to appeal, we do not see how the question of *res judicata* can be made to depend on the plaintiff's election to appeal or to refrain from appealing. The Full Bench case of *Somasundara Mudali* v. *Kulandai Velu Pillai*(4) does not lay down a rule that a defendant having no right of appeal can in no case be bound by the decree even when, as here, he might have been made a co-plaintiff and where he chooses as defendant to contest the suit against the other defendants.

We do not think there is any conflict between the case of *Kandiyil Cheriya Chandu* v. *The Zamorin of Calicut*(1) and the Full Bench case and we cannot distinguish the case of *Kandiyil Cheriya Chandu* v. *The Zamorin of Calicut*(1) from the present case on the ground suggested. We think we ought to follow the case of *Kandiyil Cheriya Chundu* v. *The Zamorin of Calicut*(1) and we dismiss the second appeal with costs.

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(1) I.L.R., 29 Mad., 515.
(2) 9 C.W.N., 584.
(3) I.L.R., 7 Mad., 149.
(4) I.L.R., 28 Mad., 457.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907.
April 3.

SRINIVASA AYYANGAR AND OTHERS (PLAINTIFF AND HIS LEGAL REPRESENTATIVES), APPELLANTS,

v.

RANGASAMI AYYANGAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Adoption—When sapinda consents on condition that adopted son should not claim the property of his adoptive father, adoption not thereby invalid.

When a Sapinda in giving his consent to an adoption, protects himself from loss by stipulating that the adopted son should not claim a share in the joint family property in the enjoyment of such sapinda, the consent of the sapinda is not given from corrupt or improper motives and the adoption will be good.

Rami Reddi v. *Rengamma*, (11 M.L.J., 20), distinguished.

V, *R* and *S* were undivided brothers. *R* died, leaving a widow, the second defendant. The second defendant succeeded as heiress to the properties of *K*, her father. She wanted to adopt a son, and *V* and *S* gave their consent to her adopting the first defendant on condition that the first defendant should not claim the family properties in the hands of *V* and *S*. The nearest reversionary heir of *K* brought this suit to declare the adoption of first defendant invalid and to declare their reversionary right to *K*'s properties.

The District Munsif held that *V* and *S* consented from corrupt motives and declared the adoption invalid.

On appeal the District Judge held the adoption valid and dismissed the suit.

Plaintiff appealed to the High Court.

S. Gopalaswami Ayyangar for appellant.

T. R. Ramachandra Ayyar for respondents.

JUDGMENT.—We think that the District Judge was right in holding that a stipulation by a sapinda assenting to an adoption

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* Second Appeal No. 1403 of 1904, presented against the decree of D. Broadfoot, Esq., District Judge of Chingleput, in Appeal Suit No. 55 of 1904, presented against the decree of M.R.Ry. P. M. Visvanatha Ayyar, District Munsif of Chingleput, in Original Suit No. 201 of 1903.

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SRINIVASA AYYANGAR v. RANGASAMI AYYANGAR.

that the adopted boy should not share in the joint property of the family into which he was to be adopted, but should be content with the property coming to him from his adoptive mother would not invalidate the adoption. The sapinda, it is admitted, was free to give or withhold his assent and the fact that he was prepared to refuse to give it unless it was agreed that his share of the joint family was not to be diminished as the result of admitting a new member into the family by adoption does not show that he was actuated by corrupt or improper motives in giving his consent or that he did not consider the boy a suitable candidate for adoption. He gained nothing by the adoption, but only endeavoured to protect himself from loss, and to secure that he should be no worse off after the adoption than if he had refused his consent which he was fully at liberty to do. This is a very different case from the case of *Rami Reddi* v. *Rengamma*(1), where the sapinda received a bribe to induce him to consent. We decide nothing as to the effect of the stipulation except that it did not invalidate the adoption.

The District Judge should not, we think, have dismissed the suit, but should have remanded it to the District Munsif for disposal on the merits. We set aside the decrees of the Courts below and remand the case to the District Munsif for disposal according to law. Costs in this and the lower Appellate Court will abide the result.

(1) 11 M.L.J., 20.

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APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Miller.

1907. April 18, 19.

KAMAKSHI AMMAL (PLAINTIFF), APPELLANT,

v.

CHAKRAPANY CHETTIAR AND OTHERS (DEFENDANTS NOS. 1 TO 4 AND LEGAL REPRESENTATIVES OF DEFENDANT NO. 5), RESPONDENTS.*

Hindu Law, Mitakshara—Gift—Gift of considerable portion of moveable or immoveable joint family property invalid—Acquiescence.

An undivided member of a Hindu family governed by the Mitakshara Law, has no power to alienate any considerable portion of the moveable or immoveable properties belonging to the joint family by way of gift to the female members of the family.

When the portion so alienated is not severed from the family property, but the income alone is given to the donees, the objecting co-parcener is not barred by acquiescence from questioning the alienation merely because he did not object to the payment of such income.

Bachoo Harkisondas v. *Mankorebai*, (I.L.R., 29 Bom., 51), distinguished.

Ramasawmy Ayyar v. *Vengidusami Ayyar*, (I.L.R., 22 Mad., 113), distinguished.

SUIT for the recovery of land. Plaintiff was the daughter of one Ramasawmy and the first defendant a grandson of Ramasawmy by a predeceased son.

Plaintiff's case was that the plaint properties were given by Ramasawmy as stridanam to her by deed, duly registered, dated 9th December 1892, that Ramasawmy held them in trust for her and was paying the income thereof to her till his death in February 1898, and that after his demise first defendant continued the same up to March 1900, but failed to do so subsequently, and that when she attempted to cultivate the lands through her lessees in August 1900, she was obstructed by first defendant. Hence this suit.

First defendant contended *inter alia* that his grandfather Ramasawmy was not competent to make a gift of his ancestral family properties, and that the gift even if true, as a matter of fact, was in valid inlaw.

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* Second Appeal No. 884 of 1904, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, Appeal Suit No. 779 of 1903, presented against the decree of M.R.Ry. P. Aiyasami Mudaliar, District Munsif of Tiruvadi, in Original Suit No. 448 of 1901.

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KAMAKSHI AMMAL v. CHAKRAPANY CHETTIAR.

The District Munsif found that the plaint properties were joint family properties of deceased Ramasawmy and first defendant; that first defendant never paid any income after the death of Ramasawmy to plaintiff. He dismissed the suit holding that the gift to plaintiff was invalid and that first defendant had not acquiesced in same.

The judgment was confirmed by the District Judge on appeal.

The plaintiff appealed to the High Court.

P. R. Sundara Ayyar for appellant.

The Hon. Mr. *P. S. Sivaswami Ayyar* for *V. Krishnaswami Ayyar* for first respondent.

JUDGMENT.—The first contention raised by Mr. Sundara Ayyar for the appellant is that the property given to the plaintiff by her father was not joint family property, but the separate property of the giver. Both the lower Courts are against him on this point and we see no reason to differ from them. The property was acquired by Ramasawmy and his son Rangasawmy jointly and the presumption that it was the joint property of the acquirers held by them as joint family property has not been rebutted.

Mr. Sundara Ayyar next contended that the gift was acquiesced in, and therefore ratified or confirmed by Rangasawmy's son, who cannot now contest it. Again, both Courts are against him. The District Munsif found that Rangasawmy's son has made no payments to the plaintiff on account of the income of the property, and the District Judge does not reverse that finding, but says that even if such payments were made for a short time after Ramasawmy's death, they would not prove acquiescence in the gifts.

The land and other property given to the plaintiff was not severed from the family estate, Ramasawmy merely credited to his daughter in his accounts and paid to her the income derivable from it. It cannot be held that because Ramasawmy's grandson did not make a public protest against his grandfather's payments during his grandfather's lifetime, payments to which, it may very well be, he had no objection so long as they were made by his grandfather out of the family income, he is now to be estopped from contesting the validity of the alienation of part of the corpus of the family property. He stopped the payments soon, if not immediately, after he obtained the control of the income and the lower Courts are right in refusing to accept the contention that first defendant has ratified the gifts by acquiescence.

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KAMAKSHI AMMAL v. CHAKRAPANI CHETTIAR.

The remaining question is whether the gift is valid under the Hindu law. It has to be remembered that the gift to the plaintiff is only one of several gifts made by Ramasawmy to his three daughters and his wife, and, whatever weight be given to the text in Mitakshara I, 1, 27, we do not think it can be held to authorise the setting apart of a considerable portion of the family property whether moveable or immoveable, and the partition of it among the ladies of the family. None of the cases cited at the bar goes so far as this. In *Bachoo Harkisondas* v. *Mankorebai*(1) the gift was out of income and amounted to a very small proportion of the property, and in *Hanmantapa* v. *Jivubai*(2) the gift was of moveable property most of which had been acquired by the giver himself. The case of *Ramasawmi Ayyar* v. *Vengidusami Ayyar*(3) is in point as it is not found that the gift here was made as part of the marriage expenses of the plaintiff, and there are no cases in this Court in which such a settlement as we have here has been held to be authorised by the Mitakshara.

The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Miller.

1905. February 28. March 19.

RAJAH OF KALAHASTI (PLAINTIFF), PETITIONER,

v.

ACHIGADU (DEFENDANT), RESPONDENT.*

Succession Certificate Act, Act VII of 1889—*Successor to impartible zamindari not entitled to recover debts due to his predecessor without a certificate under the Act.*

The successor to an impartible estate is not a co-owner with his predecessor in the moneys due to the latter before his death. He derives his title to such debts only at the death of his predecessor, as part of such predecessor's effects and cannot recover them without obtaining a certificate under Act VII of 1889.

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(1) I.L.R., 29 Bom., 51. (2) I.L.R., 24 Bom., 547.
(3) I.L.R., 22 Mad., 113.

* Civil Revision Petition No. 243 of 1906, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of Muhammad Fusluddin Sahib, District Munsif of Tiruvallur, in Small Cause Suit No. 8 of 1906 (*vide* Civil Revision Petition Nos. 244 and 245 of 1906).

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RAJAH OF KALAHASTI v. ACHIGADU.

The rule of succession in impartible estates is based on a theroetical co-parcenary and not on any actual unity of interest between the predecessor and his successor, and this theoretical community of interest can be applied only for the purpose of determining the succession and for no other purpose whatsoever.

The Pittapore case, (I.L.R., 22 Mad., 397), referred to.

Observations of SANKARAN NAIR, J., in *Nachiappa Chettiar* v. *Chinnayasami Naicker*, (I.L.R., 29 Mad., 459), considered and not followed.

Kali Krishna Sarkar v. *Raghunath Deb*, (I.L.R., 31 Calc., 224), not followed.

THE facts necessary for the purpose of the report are sufficiently stated in the judgment.

R. Subrahmania Ayyar for petitioner.

The respondent was not represented.

JUDGMENT.—The defendants in all these suits are ryots of the impartible zamindari of Kalahasti, and the plaintiff is the Raja. While the zamindari was in the hands of the Court of Wards the defendants executed in favour of the manager, bonds or promissory notes for arrears of rent due by them, and, on some of them, the manager filed suits.

On the death of the incapacitated proprietor pending these suits, they were continued by the present plaintiff, his successor, and in cases in which such suits had not been commenced, the documents were handed over with the zamindari to him.

The District Munsif has dismissed all the suits on the ground that the plaintiff, after sufficient opportunity, has failed to produce a succession certificate as required by Act VII of 1889.

The plaintiff appeals and none of the defendants have appeared to contest the appeals.

For the appellant, it was suggested rather than argued, that because the manager of the Court of Wards is still alive, no succession certificate can be required. That could only be so if the plaintiff were continuing the suits as representative of the manager, or suing on the documents as his assignee. That he is not doing.

The question is whether the plaintiff claims these debts as the effects of his deceased predecessor.

The question whether an impartible zamindari devolving on the zamindar's decease upon his successor, is assets in the hands of the latter available to creditors of the former, has been considered in this Court in *Nachiappa Chettiar* v. *Chinnayasami Naicker*(1)

(1) I.L.R., 29 Mad., 453.

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and in the Calcutta High Court in *Ram Doss Marwari* v. *Tekaih Braja Behari Singh*(1) and *Kali Krishna Sarkar* v. *Raghunath Deb*(2).

The decisions in the Calcutta High Court are conflicting. In the earlier case it was held that the succession was not by survivorship and the zamindari was assets. In *Kali Krishna Sirkar* v. *Raghunath Deb*(2), the contrary view was taken: it was held that the Privy Council had decided that the succession was by "survivorship" and the learned Judges did not "see why the incidents of survivorship as to partible estates should not apply to an impartible estate." These two were cases in which the holder of a decree against a deceased zamindar sought to execute it against his successor.

In the case in this Court, the suit was on a promissory note executed by the deceased zamindar but not for family purposes: it was held that the zamindari in the hands of his successor, his undivided brother, was not assets against which a decree could be obtained. It is not necessary for us to discuss the decisions of the Privy Council bearing on this matter. In the suit in this Court to which we have just referred, Sankaran Nair, J., states the effect of them in words which we adopt. They "clearly establish," he says, "that the deceased and the first defendant were not co-parceners or joint tenants. There was no unity of possession, of enjoyment or of interest."

In *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Singh*(3) a case decided after the case of *Sartaj Kuari* v. *Deoraj Kuari mother and guardian of Lal Narindar Bahadur Pal*(4), but before the Pittapur case (*Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards and Venkata Kumari Mahipati Surya Rao*(5)), their Lordships of the Privy Council held that the succession in that case was "by virtue of survivorship," but in an earlier part of the judgment they explain that "in considering who is to succeed on the death of the Raja, the rules which govern the succession to a partible estate are to be looked at"; that is to say, as we understand it, the Raja's successor is to be chosen from among those who "but for the impartibility of the estate would have been co-parceners with

(1) 6 C.W.N., 879.
(2) I.L.R., 31 Calc., 224.
(3) I.L.R., 18 Calc., 151.
(4) I.L.R., 10 All., 272.
(5) I.L.R., 22 Mad., 383 at p. 397.

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him" (*Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora*(1)). And in the Pittapur case, their Lordships point out that the language used in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Singh*(2) was intended to apply only to the succession to the estate. It seems very clear that in their Lordships' view the rule of succession by virtue of survivorship is a survival from a theoretical co-parcenary (Mayne's 7th edition, section 418, p. 556) and not based upon any actual unity of interest between one Raja and his successor, existing at the present day.

Sankaran Nair, J., accepts this view in *Nachiappa Chettiar* v. *Chinnayasami Naicker*(3), but holds that, inasmuch as for purposes of succession, the case is to be treated as though there existed a true right of survivorship based on unity of interest, he is not bound to disregard the decisions of this Court which have held that such unity of interest exists, and he may, for the purpose of deciding the point before him, treat the case as if such unity does exist, though in fact it does not.

Now with regard to the decisions of this Court, the Privy Council have pointed out in the Pittapur case that they were based on such divergent views and inconsistent reasons that they "are deprived of much authority," and that they were overruled in the same Court in 1889. And there is no decision in this Court since *Sartaj Kuari* v. *Deoraj Kuari mother and gurdian of Lal Narindar Bahadur Pal*(4) was reported, which upholds the theory of community of interest except for the purpose of arriving at a rule of succession. There is thus, we think, no course of decisions standing unreversed which ought to influence us in laying down the rule to be adopted in the case before us. The rule of succession is an anomalous rule in the sense that it is not supported by any existing right, which the law can regard as a natural, reasonable and sufficient foundation for it. It is a survival, a superstructure of which the foundation has perished in the course of ages, and which stands now only because it is buttressed by a series of decisions of the Privy Council, and underpinned perhaps by considerations based on the expediency of preserving an estate in the nature of a Raj in the hands of a man rather than of a woman and perhaps also by that conservative adherence to custom which

(1) 13 M.I.A., 340.
(2) I.L.R., 18 Calc., 151.
(3) I.L.R., 29 Mad., 459.
(4) I.L.R., 10 All., 272.

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is nowhere stronger than in matters relating to succession and inheritance.

Are we then to add anomaly to anomaly. The Privy Council have refused to do so. The rule of succession must be upheld though its foundation, community of property, has vanished, but their Lordships on the express ground of the absence of a co-parcenary, have refused to rule that the power of the owner of an impartible zamindari to alienate the property can, in the absence of special custom, be controlled by the members of his family.

We are unable in these circumstances to adopt the reasoning of Sankaran Nair, J., as sufficient to support the conclusion that we ought, in the case now before us, to do what the Privy Council have in an analogous matter declined to do.

And a similar observation applies to *Kali Krishna Sarkar v. Raghunath Deb*(1). If there is no reason "why the incidents of survivorship as to partible estates should not apply to an impartible estate," it is hard, we think, with great deference to see why the power to control alienation which is an incident of the right to succeed by survivorship, should not also apply to an impartible estate.

Act VII of 1889 was passed principally for the protection of honest debtors. The debtor is entitled before payment to ask that the person demanding payment should satisfy him either that he is as the heir of the person who lent the money entitled to receive repayment, or that he is so entitled as having been an owner of the money lent, before the death of the lender. In the former case the succession certificate is the proper evidence.

It being clear that the plaintiff was not a joint owner of the money due before his predecessor's death, there seems to us to be no sufficient reason why he should be treated as if he had such ownership, and why he should not be held to have derived his right to the debts in question only on the death of the late Raja, and to be claiming them as the late Raja's effects.

We dismiss the civil revision petitions.

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(1) I.L.R., 31 Calc., 224.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar.

SHANMUGA PILLAI (PLAINTIFF), PETITIONER,

1907.
March 11, 12.

v.

MINOR GOVINDASAMI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, sch. II, arts. 62, 120—Suit to recover money received under a transaction which is an absolute nullity governed by art. 62 and not 120, and cause of action arises on the date of payment.

A suit by *A* to recover from *B* money which *B* had recovered from a debtor of *A* under colour of a void assignment of such debt by *A* to *B* is an action for money had and received and must be brought within three years of the payment by the debtor to *B* under article 62 of schedule II of the Limitation Act. Article 120 does not apply to such a case.

Nund Lall Bose v. Meer Aboo Mahomed, (I.L.R., 5 Calc., 597), dissented from *Mahomed Wahib v. Mohomed Ameer,* (I.L.R., 32 Calc., 532), followed.

PLAINTIFF transferred a mortgage deed obtained by him from one *V* to the deceased *M*, mother of defendants Nos. 1 and 2. *M* recovered from *V* one year's interest due under the mortgage on 30th April 1901. Plaintiff brought a suit against *M* in which it was declared that the assignment of the mortgage by plaintiff to *M* was void *ab initio* as being made for an immoral consideration.

The plaintiff now sued to recover from the legal representatives of *M* the amount recovered by *M* from *V* in 1901. The suit was filed in 1905 more than three years after the date of payment to *M*.

The District Munsif dismissed the suit.

Plaintiff applied to the High Court to revise the decision under section 25 of the Small Cause Court Act.

T. V. Gopalasami Mudaliar for petitioner.

K. S. Ramasami Sastri for respondents.

JUDGMENT.—I am unable to accede to the contention that the decision in the suit between the present petitioner and the mortgagor Veera Padayachi has any bearing upon this case. The

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* Civil Revision Petition No. 398 of 1906, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of M.R.Ry. T. T. Rangachariar, Subordinate Judge of Kumbakonam, in Small Cause Suit No. 2105 of 1905.

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short question here is, whether the petitioner is entitled to recover from the defendants the sum of Rs. 280, which the first and second defendants' mother received under the colour of the assignment of the mortgage bond by the petitioner to her. That the assignment was *ab initio* void is beyond dispute, and such being the case, the receipt by the first and second defendants' mother of the interest on the mortgage amount under the colour of the assignment was an act which gave rise to a cause of action on the date of the receipt, *i.e.*, the 30th April 1901. The present suit was brought more than three years from that date though within six years. Is the case governed by article 120 of the schedule to the Limitation Act as contended for the petitioner or by article 62 as contended for the defendant? I am of opinion the latter article is applicable. Undoubtedly, this was a case where at the time of the receipt the party receiving had no right to the money, and with reference to the party suing she was bound to hand it over to him. In the well-known words of the law the suit is one for money had and received. Mr. Gopalasami Mudaliar on behalf of the petitioner cited *Nund Lall Bose* v. *Meer Aboo Mahomed*(1), which decision, if correct, would support his contention that article 120 and not article 62 applies. But the view which was taken there of the scope of article 62 was dissented from in *Mahomed Wahib* v. *Mahomed Ameer*(2), and I entirely agree in the exposition of the law therein laid down as to the nature of an action for money had and received. As regards the other cases cited by Mr. Gopalasami Mudaliar, *i.e.*, *Muhammad Habibullah Khan* v. *Safdar Husain Khan*(3), *Gurudas Pyne* v. *Ram Narain Sahu*(4) and *Krishnan* v. *Perachan*(5), they are, in my opinion, clearly distinguishable. *Muhammad Habibullah Khan* v. *Safdar Husain Khan*(3) was a case which was not in the proper sense of the term an action for money had and received, but a suit for an account and for the recovery of the balance which may be found due. In *Gurudas Pyne* v. *Ram Narain Sahu*(4) the plaintiff's suit was for recovery of money, not on the ground that it had been received by the defendant for the use of the plaintiff, but on the ground

(1) I.L.R., 5 Calc., 597.
(2) I.L.R., 32 Calc., 532.
(3) I.L.R., 7 All., 25.
(4) I.L.R., 10 Calc., 860.
(5) I.L.R., 15 Mad., 382.

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that the plaintiff as the person rightfully entitled thereto was pursuing it in the hands of the defendant as the actual party in possession thereof at the time. This is clearly pointed out by their Lordships at pages 864 and 865. *Krishnan* v. *Perachan*(1) is substantially the same. The money there sued for was compensation which the Government had paid for a certain piece of land. The dispute was whether the property belonged to *C* who originally received the compensation money or to *B* the judgment-debtor of the plaintiff. It having been found that the land belonged to *B* the judgment-debtor, the creditor's suit was against the party in possession of the money.

The present suit is, in my opinion, clearly barred and without going into the other questions argued on both sides, I dismiss the petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

MANGALATHAMMAL (PLAINTIFF), PETITIONER,

v.

NARAYANSWAMI AIYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

1907. March 18, 19, 26.

Contract Act, Act IX of 1872, *s*. 69—*Money paid by purchaser towards an incumbrance subject to which he buys, not recoverable under*—Res judicata—*Erroneous decision on a question of law how far a bar in subsequent suit.*

Where a purchaser of property at a Court sale purchases it subject to a charge for maintenance, such purchaser cannot, under section 69 of the Contract Act, recover from the owner in whose hands it was so liable, payments made by him (the purchaser) towards maintenance to prevent the sale of the property.

An erroneous decision on a question of law in a previous suit is no bar in a subsequent suit between the same parties to the Court deciding the same question, provided the decision in the latter suit does not in any away question the correctness of the former decree or in any way affect its operation.

Gopu Kolandavelu Chetty v. *Sami Royar*, (I.L.R., 28 Mad., 517), referred to.

Alimunissa Chowdhurani v. *Shama Charan Roy*, (I.L.R., 32 Calc., 749), referred to.

Koyyana Chittamma v. *Doosy Gavaramma*, (I.L.R., 29 Mad., 225), referred to.

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(1) I.L.R., 15 Mad., 382.

* Civil Revision Petition No. 54 of 1906, presented under section 25 of Act IX 1887 praying the High Court to revise the decree of M.R.Ry. V. Subramaniyam Pantulu, Subordinate Judge of Tanjore, in Small Cause Suit No. 1882 of 1904.

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MANGALATHAMMAL v. NARAYANSWAMI AIYAR.

SUIT to recover Rs. 83-9-3 from defendants under section 69 of the Contract Act. Defendants Nos. 2 to 6 were the sons of first defendant. Plaintiff obtained a decree against defendants Nos. 1 to 5 for the principal and interest due on a hypothecation bond executed by first defendant on 24th March 1895 to be recovered by the sale of the hypothecated property. By a deed of maintenance which first defendant had executed to one Subba Lakshi Ammal (first defendant's brother's widow) on 16th March 1889 the same lands had been charged with the maintenance made payable to her annually thereby. The said lands were sold in pursuance of the decree obtained by plaintiff and plaintiff purchased the same subject to the charge for maintenance. First defendant having made default in paying the maintenance due to Subba Lakshi Ammal, the latter filed Original Suit No. 238 of 1900, obtained a decree for the amount due to her by the sale of the lands on which the maintenance was charged, and proceeded to bring the property which plaintiff had purchased to sale in accordance with the said decree. Plaintiff paid Rs. 50 to Subba Lakshi Ammal and afterwards filed Original Suit No. 7 of 1901 against first defendant and his sons Nos. 2 to 5 to recover the amount and obtained a decree.

Plaintiff again paid Rs. 81-7-9 on 20th September 1904 for a subsequent instalment of the maintenance decree to Subba Lakshi Ammal and filed this suit to recover the said sum from defendants Nos. 1 to 5.

The defendants pleaded that plaintiff having purchased the lands subject to the maintenance charge was not entitled to recover the money.

The Subordinate Judge dismissed the suit with costs.

Plaintiff applied to the High Court under section 25 of the Small Cause Court Act.

S. Gopalaswami Ayyangar for petitioner.

G. S. Ramachandra Ayyar for respondent.

JUDGMENT.—The first defendant in the suit mortgaged part of the joint family property of the defendants to the plaintiff who brought it to sale and became the purchaser at the Court auction. The property in the hands of the defendants was subject to a charge for maintenance in favour of a widow. This charge was mentioned in the sale proclamation and the plaintiff purchased the property subject to it. The plaintiff has since paid the widow her

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maintenance on several occasions to prevent the property from being brought to sale in satisfaction of the charge, and now sues under section 69 of the Indi n Contract Act, to recover from the defendants money so paid to the widow. The Subordinate Judge has dismissed the suit, we think, rightly, as the plaintiff having purchased the property subject to the charge for maintenance has no cause of action against the defendant when the charge is enforced against the property and she pays to avoid a sale. In private sales the buyer is bound under section 55 (5) (*d*) to pay the principal and interest on incumbrances subject to which the property is sold, and the same principles must apply to Court sales.

It is however objected that this question is *res judicata* in the plaintiff's favour because in a previous suit she recovered from the defendants money which she had paid in satisfaction of the maintenance charge. There was no dispute about the facts between the parties and judgment was given for the plaintiff because the Court had arrived at an erroneous conclusion on a point of law. It has long been settled by authority in this Court and cannot, we think, now be questioned that the erroneous decision by a competent tribunal of a question of law directly and substantially in issue between the parties to a suit does not prevent a Court from deciding the same question arising between the same parties in a subsequent suit according to law; *Parthasaradi* v. *Chinnakrishna*(1), *Venku* v. *Mahalinga*(2), *Gopu Kolandavelu Chetty* v. *Sami Royar*(3); see also *Chamanlal* v. *Bapubhai*(4), and *Alimumissa Chowdhurani* v. *Shama Charan Roy*(5). The Court cannot of course allow the correctness of the decree given in the former suit to be questioned in the later suit on the ground that the former suit was decided under a mistake of law, nor can it pass a decree the effect of which would be to set at naught in whole or in part the decree in the former suit, as it was asked to do in *Kaveri Ammal* v. *Sastri Ramier*(6), and *Koyyana Chittemma* v. *Doosy Gavaramma*(7). See also *Alimumissa Chowdharani* v. *Shama Charan Roy*(5), where the distinction is clearly explained.

(1) I.L.R., 5 Mad., 304.
(2) I.L.R., 11 Mad., 396.
(3) I.L.R., 28 Mad., 517.
(4) I.L.R., 22 Bom., 669.
(5) I.L.R., 32 Calc., 749.
(6) I.L.R., 26 Mad., 104.
(7) I.L.R., 29 Mad., 225.

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MANGALATHAMMAL v. NARAYANSWAMI AIYAR.

In the present case the decree passed by the lower Court does not in any way affect the operation of the decree in the former suit, and is therefore not open to this objection.

The petition is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. April 4, 17.

KAMALAMMA (APPELLANT IN SECOND APPEAL No. 72 OF 1904 ON THE FILE OF THIS COURT), PETITIONER,

v.

KOMANDUR NARASIMHA CHARLU AND OTHERS (RESPONDENTS Nos. 1 TO 4 IN THE ABOVE), RESPONDENTS.*

Transfer of Property Act, Act IV of 1882, *ss.* 88, 90—*Mortgage decree under s.* 88 *cannot impose personal liability for costs—Such liability should be enforced under s.* 90.

It will be contrary to the scheme of the Transfer of Property Act and to the practice of the English Courts of Equity to make the mortgagor personally liable for costs in any case before the sale-proceeds have proved insufficient to satisfy the mortgage claim.

Sharples v. *Adams*, (32 Beav., 213), referred to.

Liverpool Marine Credit Co. v. *Wilson*, (L.R., 7 Ch., 507), referred to.

A decree under section 88 of the Transfer of Property Act must not order the defendants personally to pay the costs. It may contain a declaration of the personal liability of defendant for principal or costs, but such a declaration is not part of the usual form of decree under the Transfer of Property Act and is enforceable only under section 90. The words 'the amount due on the mortgage for the time being' in section 90 must be taken to include costs.

Maqbul Fatima v. *Lalta Prasad*, (I.L.R., 20 All., 523), referred to.

THE facts necessary for the purposes of this report are sufficiently set out in the judgment.

The Hon. Sir *V. C. Desika Chariar* for petitioner.

T. Rangaramanujachariar for third respondent.

ORDER.—This is a petition under section 206 of the Civil Procedure Code praying for the amendment of the decree in

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* Civil Miscellaneous Petition No. 148 of 1907, praying that, in the circumstances stated therein, the High Court will be pleased to bring the decree in Second Appeal No. 72 of 1904 in conformity with the judgment of this Court, dated 24th July 1906, in Second Appeal No. 72 of 1904 by directing the costs to be paid by the defendants personally.

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Second Appeal No. 72 of 1904 so as to bring it into conformity with the Judgment. The judgment set aside the decrees of the lower Courts dismissing the suit and gave the plaintiff a decree for sale on the mortgage sued on. The judgment merely says: "The decrees of the District Judge and District Munsif are set aside and the plaintiff awarded a decree as prayed with costs throughout. The usual mortgage decree will be drawn up under the terms of the Transfer of Property Act." On this a decree was drawn up in accordance with Form 128 in schedule IV of the Civil Procedure Code which is prescribed by section 646 of the Civil Procedure Code as the form of decree for sale, in a suit by a mortgagee, that is to say, the form of decree under section 88 of the Transfer of Property Act. As no other form of decree is now prescribed by this Court for use on this side of the Court, we think the decree was rightly drawn up in this form. Neither this form of decree nor the form prescribed on the Original Side contains any order for costs against the defendant personally and we think it would be opposed to the scheme of the Transfer of Property Act to make such an order against the defendants personally at this stage, although there would be no objection and it might even be desirable to insert a declaration as to the personal liability of the defendants whether for principal, interest or costs; such a declaration however cannot at present be said to be part of the usual form of decree under the Transfer of Property Act. According to the scheme of the Transfer of Property Act we think that payment was intended to be enforced against the defendant personally under section 90, and that the words, "the amount due for the time being on the mortgage" in that section must be taken to include costs. In *Maqbul Fatima* v. *Lalta Prasad*(1), the Allahabad High Court went so far as to hold that, where the Court in its judgment had directed a decree to be drawn up under section 88 of the Transfer of Property Act and a direction was inserted in the decree that the defendant should pay the plaintiffs the costs incurred by them, such direction could not be enforced against the defendant personally except by application under section 90. We think it would not only be opposed to the scheme of the Transfer of Property Act but also inequitable and opposed to the practice of Courts of Equity in England as exemplified

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(1) I.L.R., 20 All., 523.

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KAMALAMMA v. KOMANDUR NARASIMHA CHARLU.

in *Sharples* v. *Adam*(1) and *Liverpool Marine Credit Co.* v. *Wilson*(2) to make the mortgagor personally liable for costs in any case before the sale-proceeds have proved insufficient to satisfy the mortgagee's claim.

The petition is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. July 15, 25.

EMPEROR v. MUTHIA SWAMIYAR.*

Criminal Procedure Code, Act V of 1898, ss. 162, 164—Right of accused to copies of statements made by Magistrate under.

An accused person under remand is not, before the commencement of the preliminary inquiry, entitled to be furnished with copies of statements made on oath by various persons and recorded by the Magistrate under sections 162 and 164 of the Code of Criminal Procedure.

No such right is conferred by the Code of Criminal Procedure and the question whether any person has a right to inspect a public document is outside the scope of the Evidence Act.

Such statements may, however, be put in to contradict the persons making them when called as witnesses and it will then form part of the record, of which the accused will be entitled to a copy after commitment. There is no general principle of common law which would entitle an accused person to copies of such documents.

Queen-Empress v. *Arumugam*, (I.L.R., 20 Mad., 189), distinguished.

THE facts are fully stated in the Letter of Reference which is as follows:—

The Public Prosecutor in support of the reference.

In the course of an investigation into an offence of murder the Stationary Second-class Magistrate of Musiri recorded on oath the statements of some witnesses under section 164, Criminal Procedure Code. The accused Muthia Swamiyar who was arrested on the 8th March last and has been on remand, applied to the Sub-Magistrate

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(1) 32 Beav., 213. (2) L.R., 7 Ch., 507.

* Case referred No. 26 of 1907 (Criminal Revision Case No. 152 of 1907) for the orders of the High Court under section 438 of the Code of Criminal Procedure by the Acting Sessions Judge of Trichinopoly in his letter, dated 5th April 1907, No. 1077.

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EMPEROR v. MUTHIA SWAMIYAR.

who had the custody of the statements for copies of them. In his proceedings under reference the Sub-Magistrate refused to grant copies, relying on the Full Bench decision in *Queen-Empress* v. *Arumugam*(1), which refers to occurrence reports and charge sheets, but does not seem to apply to the statements in the present case. I see no sufficient reason to justify the refusal of the Magistrate to grant the copies and I therefore submit that his order is illegal and should be set aside.

ORDER.—The question referred to us is whether an accused person under remand is, before the commencement of the preliminary enquiry against him, entitled to copies of statements of various persons recorded by the Second-class Magistrate under section 164 of the Criminal Procedure Code. In *Queen-Empress* v. *Arumugam*(1) it was held by the Full Bench that an accused person was not entitled to copies of the reports made by a police officer under sections 157 and 158 of the Criminal Procedure Code. It was held by Collins, C.J., and Benson, J., that the same rule applied to charge sheets under section 173 of the Criminal Procedure Code, but Shephard and Subrahmania Ayyar, JJ., were of opinion that such charge sheets were public documents which the accused had a right to inspect under section 76 of the Indian Evidence Act. We have not been referred to any authority in which the present question is dealt with. It cannot, we think, be determined merely with reference to the question whether these statements are public documents within the definition in section 74 of the Evidence Act, because section 76 only provides the means of proof of public documents which any person has the right to inspect, and whether any person has a right to inspect any particular public document is, in our opinion, a question not dealt with by the Evidence Act and altogether outside its scope. The Code of Criminal Procedure does not give an accused person a right to inspect and have copies of statements recorded under section 162 before the beginning of the preliminary inquiry, but merely provides for giving the accused a copy of the charge, section 210, for giving any person affected by any judgment or order passed by a Criminal Court, a copy of the Judge's charge to the jury or of any order or deposition or other part of the record under section 548, and for giving the accused a copy of the depositions taken after his commitment free

(1) I.L.R., 20 Mad., 189.

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EMPEROR v. MUTHIA SWAMIYAR.

of charge, section 219. None of these sections entitles the prisoner to a copy of the statements under section 162 at the present stage. There is, however, no provision similar to section 173 of the Criminal Procedure Code which forbids these statements to be used as evidence and if a witness at the preliminary inquiry has previously made a statement under section 162, such statement may be put in to contradict him when it will become part of the record and the accused will be entitled to a copy after commitment.

We think that if the framers of the Code had intended that persons under remand should be entitled to copies of statements under section 162 of the Criminal Procedure Code, they would have said so. On the contrary, we think they deliberately refrained from doing so on grounds of public policy and in accordance with the principle embodied in section 125 of the Evidence Act. The question must, in our opinion, be decided in accordance with the provisions of the Code. We know of no general principle of the common law which would entitle an accused person to copies of documents of this kind. As regards the English cases referred to in the Order of Reference in *Queen-Empress* v. *Arumugam*(1), in which the parties were allowed copies of public documents on the ground of interest, the limits of the common law right to inspect and take copies on the ground of interest were not discussed or in question in *Mutter* v. *Eastern and Midlands Railway Co.*(2), or the other cases referred to, and we are not aware of any English authority in favour of allowing an accused person to inspect and take copies of statements such as these. We must, therefore, decline to interfere in revision with the Magistrate's order.

(1) I.L.R., 20 Mad., 189. (2) L.R., 38 Ch. D., 92.

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APPELLATE CRIMINAL.

Before Mr. Justice Wallis and Mr. Justice Miller.

EMPEROR

v.

SIRANADU AND ANOTHER.*

1907.
August 28.

Criminal Procedure Code—Act V of 1898, s. 307—Jury not to be questioned as to reasons for verdict.

When the jury return a verdict on the general issue of guilty or not guilty and there is no ambiguity as to the precise offence of which the accused are convicted or acquitted, the Session Judge has no power, under section 307 of the Code of Criminal Procedure, to question the jury as to the reasons for their verdict.

THE accused in this case were tried before the Court of Sessions of North Arcot on charges under section 394, Indian Penal Code. The jurors returned an unanimous verdict of not guilty and the Sessions Judge put questions to them as to the reasons for their verdict and not being satisfied with the verdict, he referred the matter to the High Court under section 307 of the Code of Criminal Procedure.

The Public Prosecutor in support of the reference.

JUDGMENT.—We do not think there are sufficient grounds for interfering with the verdict of the jury in this case and we acquit the accused and direct their discharge. With reference to the course taken by the Sessions Judge in questioning the jury as to the reasons for their verdict, we are of opinion that where the jury return a verdict on the general issue of guilty or not guilty, and there is no ambiguity as to the precise offence of which the accused are convicted or acquitted, section 307 of the Criminal Procedure Code does not authorize the Sessions Judge to question the jury, as the only questions he is entitled to put to the jury are "such questions as are necessary to ascertain what their verdict is." We have therefore refused to consider the answers given by the jury on this occasion.

* Criminal Reference No. 18 of 1907 under section 307 of the Code of Criminal Procedure by K. C. Manavedan Raja, Esq., Sessions Judge of North Arcot Division in case No. 34 of the Calendar for 1907.

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APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Subrahmania Ayyar, Mr. Justice Benson and Mr. Justice Wallis.

1905. December 13. 1907. January 18. July 8.

DHUTTALOOR SUBBAYYA AND ANOTHER (PLAINTIFF'S SONS AND LEGAL REPRESENTATIVES), APPELLANTS,

v.

PAIDIGANTAM SUBBAYYA AND OTHERS (DEFENDANTS NOS. 1 TO 3), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, *s.* 544—*Ground common to all the defendants—Decree against all defendants may be reversed on appeal by one against the whole decree, when such decree has proceeded on a ground common to all.*

When the decree of the lower Court proceeds on a ground common to all the defendants, the Appellate Court under section 544 of the Code of Civil Procedure, may, on appeal by one of the defendants against the whole decree, reverse the decree in so far as it affects other defendants though they have not joined in the appeal. It is enough if any one ground on which the decree appealed against proceeds is common to all the defendants.

Syed Hussain v. *Madhan Khan*, (I.L.R., 17 Mad., 265), overruled.

Seshadri v. *Krishnan*, (I.L.R., 8 Mad., 192), approved.

SUIT by plaintiff to recover lands as reversioner of Purushothamayya deceased.

The further facts necessary for the report of this case are set out by (Subrahmania Ayyar and Wallis, JJ.) in the order of reference to the Full Bench which is as follows :—

ORDER OF REFERENCE TO A FULL BENCH.—In this case the plaintiff sued as the heir of the late Purushothamayya on the death of his widow for a declaration of his title to five items of property and to recover possession of items Nos. 3, 4 and 5, he being already in possession of items Nos. 1 and 2. The three defendants all denied his right of heirship. The first defendant admitted that the plaintiff was in possession of items Nos. 1 and 2, but claimed to be entitled to all five items under a gift by the

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* Second Appeal No. 741 of 1904, presented against the decree of K. C. Manavedan Raja, Esq., District Judge of North Arcot, in Appeal Suit No. 84 of 1903, presented against the decree of M.R.Ry. V. Ranga Rao, District Munsif of Chittoor, in Original Suit No. 677 of 1901,

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widow. The second defendant claimed item No. 5 only under a verbal gift by Purushotham the last male owner. The third defendant claimed 5 guntas out of items Nos. 3 and 4 as his own subject to an annual payment of Rs. 3 to Purushotham and his successors, and alleged that he held the remainder of items Nos. 3 and 4 under the first defendant. The District Munsif gave judgment for the plaintiff finding that he was the next heir of Purushotham and negativing the titles severally set up by the defendants. The second and third defendants did not appeal from this decree. On appeal by the first defendant alone the District Judge reversed the whole decree of the lower Court and dismissed the plaintiff's suit on the ground that the plaintiff had failed to prove his reversionary right, and did not deal with the other contentions set up by the respective defendants. It has been argued before us that as the second and third defendants did not appeal, it was not competent to the District Judge to reverse the decree in so far as it affected the second and third defendants, the parties in actual possession of items Nos. 3, 4 and 5. This depends upon whether the case comes within section 544 of the Civil Procedure Code, that is to say, whether in this case the decision of the District Munsif proceeded on any ground common to all the defendants.

Our attention was called to numerous decisions of this and the Calcutta High Courts on the construction of the section which do not appear to be altogether reconcileable.

In *Sreemutty Khermukuree Dossee* v. *Nilambur Mundul and others*(1), *Boydonath Surmah and others* v. *Ojan Bibee and others*(2), *Syed Hussain* v. *Madan Khan and others*(3), it appears to have been thought that it is not enough to make the section applicable that any one ground on which the decree of the Court appealed against proceeds is common to all the defendants, whereas *Shaikh Mahomed Saefoollah* v. *Shaikh Anwar Ali and others*(4), *Ram Kamal Shaha* v. *Ahmad Ali*(5), *Yerrabalu Viraragava Reddi* v. *Abdul Khadir Sahib and another*(6), *Seshadri* v. *Krishnan and others*(7), *Srimana Vikraman and another* v. *Rayan and others*(8), *Annamalay Chettiar*

(1) 2 W.R., 227.
(2) 11 W.R., 238.
(3) I.L.R., 17 Mad., 265.
(4) 21 W.R., 112.
(5) I.L.R., 30 Calc., 429.
(6) 4 M.H.C.R., 26.
(7) I.L.R., 8 Mad., 192.
(8) I.L.R., 16 Mad., 293.

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DHUTTALOOR SUBBAYYA v. PAIDIGANTAM SUBBAYYA.

and another v. *Pitchu Ayyar and others*(1), appear to hold that it is enough if the decree proceeds upon any ground common to all the defendants, and this view would appear to be more in accordance with the language of the section itself. In this conflict of authority we refer to the Full Bench the question whether the decree of the District Munsif against which the first defendant appealed proceeded upon any ground common to defendants Nos. 2 and 3 so as to make section 544 applicable.

The appeal came on for hearing in due course before the Full Bench constituted as above.

The Hon. Mr. *L. A. Govindaraghava Ayyar* and *K. S. Ramaswami Sastri* for appellants.

T. V. Muthukrishna Ayyar for *T. V. Seshagiri Ayyar* for first respondent.

The Court expressed the following

OPINION.—We have no hesitation in answering in the affirmative the question referred to us for decision. The decree of the District Munsif against which an appeal was made to the District Court, did proceed upon one ground which was common to all the defendants, viz., that the plaintiff was the reversionary heir of the deceased Purushotham. It was therefore competent to the District Judge on the appeal of the first defendant against the whole decree to reverse the decree in so far as it affected the other defendants also though they had not joined in the appeal. All that is necessary under the terms of section 544, Civil Procedure Code is that the decision appealed against should have proceeded on any ground common to all There is nothing in the section to warrant the importation into it of the qualifications suggested in the case of *Syed Hussain* v. *Madan Khan and others*(2). The earlier decisions of this Court in *Yerrabalu Viraragava Reddi* v. *Abdul Khadir Sahib and another*(3), and *Seshadri* v. *Krishnan and others*(4), in our opinion proceed on a right construction of the law. We overrule the decision in *Syed Hussain* v. *Madan Khan*(2).

As pointed out in *Seshadri* v. *Krishnan*(4), the reason for the rule in question is the avoidance of incongruity in judicial decisions on the same facts.

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(1) I.L.R., 28 Mad., 122.
(2) I.L.R., 17 Mad., 265.
(3) 4 M.H.C.R., 26.
(4) I.L.R., 8 Mad., 192.

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DHUTTALOOR SUBBAYKA v. PAIDIGANTAM SUBBAYYA.

In these circumstances we do not think it necessary to review the decisions of the Calcutta High Court mentioned in the order of reference.

The case came on for final hearing before (Subrahmania Ayyar and Wallis, JJ.) when the Court delivered the following

JUDGMENT.—The second appeal is dismissed. The appellants will pay the first defendant's costs.

APPELLATE SIDE—FULL BENCH.

Before Mr. Justice Subrahmania Ayyar, Mr. Justice Benson and Mr. Justice Miller.

1907. January 17, 31. July 15.

DONTARAJU SUBBARAYUDU (COUNTER-PETITIONER), APPELLANT,

v.

NEKKALAPUDI LINGAYYA (PETITIONER), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, *ss.* 41, 43, 69—'*Judgment*'—*Decision of Collector setting aside an order for ejectment under s.* 41, *is a* '*judgment*' *and appealable as such.*

The term 'judgment' as used in Madras Act VIII of 1865 must be held to include all decisions of a Collector determining the rights of parties. Where a tenant, ordered to be evicted under section 41 of the Act, applies to the Collector to set aside the order evicting him, the decision of the Collector on such application is a 'judgment' whether the application of the tenant is considered as a plaint in a summary suit to set aside the improper eviction or as an appeal under section 43 or not, and an appeal lies against such judgment under section 69 of the Rent Recovery Act.

Such right of appeal exists in favour of the landholder as well as of the tenant.

Madai Thalavoy Kummarasamy Mudaliyar v. *Nallakannu Tevan*, (5 M.H.C.R., 289), not approved.

PETITION under section 43 of Rent Recovery Act to set aside the order ejecting the petitioner from the counter-petitioner's land.

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* Second Appeal No. 1255 of 1905, presented against the order of E. L. Vaughan, Esq., District Judge of Godavari at Rajahmundry, in Appeal Suit No. 165 of 1904, presented against the order of E. L. Thornton, Esq., Sub-Collector of Ellore, in Petition No. 1807 of 1903 in Ejectment Application No. 3 of 1903.

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DONTARAJU SUBBARAYUDU v. NEKKALAPUDI LINGAYYA.

On the 6th July 1903 an application was made by the counter-petitioner to the Sub-Collector to eject the petitioner, his tenant, under section 41 of Act VIII of 1865. A warrant was issued under section 43 and served by affixture on the 25th July 1903, the petitioner having been reported absent from his house on the 15th August 1903. No appeal was preferred by the tenant and the warrant was made absolute on 16th August 1903. The counter-petitioner was put in possession on the 2nd September 1903.

The petitioner alleged that the warrant issued by the Court on 25th July 1903 was never served on him and prayed that the order of 16th August 1903 be cancelled. The counter-petitioner urged that there was no provision in Act VIII of 1865, under which petitioner's prayer could be granted and that his only remedy was by suit in a Civil Court.

The Sub-Collector set aside his previous order. On appeal, the District Judge held on the authority of *Madai Thalavoy Kummarasamy Mudaliyar* v. *Nallakannu Tevan*(1) that the order of the Collector was not a judgment and that no appeal lay. The counter-petitioner appealed to the High Court. The case came in the first instance before (Subrahmania Ayyar and Miller, JJ.) who made the following Order of Reference to the Full Bench which was as follows:—

ORDER OF REFERENCE TO A FULL BENCH.—The question raised in this case is whether an appeal lay to the District Court against an order of the Collector setting aside his previous order for the issue of a warrant for the ejectment of a tenant under section 41 of the Rent Recovery Act VIII of 1865 and declining to order ejectment.

In *Madai Thalavoy Kummarasamy Mudaliyar* v. *Nallakannu Tevan*(1) it was held that a tenant who was ordered to be ejected by an order of the Collector passed on an appeal preferred against the issue of a warrant under section 41 was not entitled to appeal to the District Court, the ground of the decision being that the order was not a judgment in a summary suit.

With reference to orders passed under section 10 ejecting a tenant for failure to accept a patta as settled by the Collector, it has been held that no appeal lay to the District Court, but in *Narasimhaswami* v. *Lakshmamma*(2), however, a different view was

(1) 5 M.H.C.R., 289. (2) I.L.R., 22 Mad., 436.

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adopted on the ground that section 73 of the Act implied that an order for ejectment under section 10 was a judgment, and in *Venkata Papayya Rao* v. *Venkata Subbayya*(1), an order refusing to eject under the same section was also held to be a judgment. The language of section 73 seems to be wide enough to cover all judgments for ejectment whether the ejectment is under section 10 or section 41. On the other hand section 44 provides that "upon delivery of possession (in pursuance of the warrant under section 41) the tenancy existing between the defaulter and the landholder shall cease and determine, unless an action shall be brought in the proper Court of Civil Judicature, within one month to reverse such delivery of possession, and shall be prosecuted to a successful termination." This would seem to imply that so far as the tenant is concerned, if he is ejected under the Collector's order his remedy is by a suit only, but so far as the landholder is concerned, the question is whether if the Collector decides against him and disallows the ejectment, that decision should not be considered a judgment in a summary proceeding, against which he is entitled to appeal.

DONTARAJU SUBBARAYUDU v. NEKKALAPUDI LINGAYYA.

Having regard to the apparent conflict between the decision in *Madai Thalavoy Kummarasamy Mudaliyar* v. *Nullakannu Tevan*(2) and the principle of the decisions allowing an appeal against orders directing or refusing ejectment passed under section 10, we refer to the Full Bench the question whether in the present case an appeal lay to the District Court against the decision of the Collector reversing his previous order and refusing to eject the respondent.

The appeal came on for hearing in due course before the Full Bench constituted as above.

K. Subrahmania Sastri for appellant. The question is whether an appeal lies to the District Court against a decision of the Collector reversing his previous order for eviction under section 41 of Act VIII of 1865. The object of the Act is to provide a landlord with an easy mode of collecting his rent without resorting to a Civil Court. [He referred to the various provisions for pattas and muchilikas, the distraint of property, etc.] Sections 50 to 68 of the Act lay down the procedure in summary suits

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(1) I.L.R., 25 Mad., 453. (2) 5 M.H.C.R. 289.

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DONTARAJU SUBBA-RAYUDU v. NEKKALA-PUDI LINGAYYA.

under the Act, and section 69 provides for appeals from all *judgments* under the Act. Sections 70 to 73 deal with the execution of judgments, and section 73 deals with judgments for ejectment or reinstatement of tenant in possession and will apply to orders under sections 10 and 41; section 60 lays down the powers of the Collector and orders for ejectment under section 10 were held to be judgments. *Narasimhaswami* v. *Lakshmamma*(1) and *Venkata Papayya Rao* v. *Venkata Subbayya*(2) were referred to.

The only question is, whether the decision is a judgment within section 69. Section 73 is wide enough to cover all cases of ejectment whether under section 10 or 41. The case of *Madai Thalavoy Kummarasamy Mudaliyar* v. *Nallakannu Tevan*(3) was wrongly decided. The application of the tenant may be treated as a summary suit under section 12 and then the decision will be a judgment.

P. Narayanamurthy for respondent. There is no appeal against orders under sections 41 and 43 which are not judgments within section 69. Judgment means only a judgment under section 68, pronounced in a summary suit in which the procedure laid down in sections 50 to 68 has been followed. Section 41 only authorises the issue of a warrant. It is not a judgment. An order of ejectment under section 10 follows on a suit under section 9 and stands on a different footing. Order of ejectment under section 10 is followed by a warrant under section 70; no such procedure under section 41. In the case of warrants under section 41, they are executed by police officers and there is no provision for waiting till the expiry of the period for appeal.

Section 44 provides that the tenancy should cease if the order is not cancelled by a Civil Court. The appellate order, if it sets aside the original order of ejectment, will therefore be infructuous, in cases in which the order is against the tenant. It is anomalous to suppose that the right of appeal is given to the landlord alone. *Madai Thalavoy Kummarasmy Mudaliyar* v. *Nallakannu Tevan*(3) was rightly decided.

The Court expressed the following

OPINION.—Upon the facts stated in the order of the Collector, it seems to us that the right view to take is that the petition of

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(1) I.L.R., 22 Mad., 436. (2) I.L.R., 25 Mad., 458.
(3) 5 M.H.C.R., 289.

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the tenant, dated the 18th October 1903, on which the Collector took action was, in truth, a plaint in a summary suit by the tenant to set aside his improper eviction under colour of a process taken under sections 41 to 43 of the Act. In this view the decision of the Collector cancelling the warrant and the delivery under it, was a "*Judgment*" against which the landholder was entitled by section 69 to appeal to the Civil Court.

Even in the view that the petition of the tenant was an appeal under section 43, we hold that the decision passed thereon is a "Judgment," against which an appeal lies under section 69.

The term "Judgment" is not defined in the Act, and must therefore be understood as including all decisions by the Collector which determine the rights of parties. There can be no doubt that when an appeal is preferred by a tenant under section 43, the matter of the application of the landholder on which the warrant is issued *ex parte* becomes litigious and has to be decided upon evidence as any other contested matter of right, and the Collector must act judicially in dealing with the evidence.

The provision of section 44 that the tenancy shall determine upon the delivery of possession unless an action shall be successfully brought by the tenant in the Civil Court, is not decisive against the view that an appeal lies against the decision of the Collector when the tenant raises an objection to the execution of the warrant. It is obvious that the provision as to the ejectment of a tenant not possessing a saleable interest was intended for the benefit of the landholder, as may be inferred from the limitation of the right of suit by the tenant.

To hold that no appeal lies against the decision would be to place the landholder at a disadvantage and compel him to have resort to the comparatively dilatory and expensive remedy of a suit in the Civil Courts. In this view, it must be conceded that the right of appeal exists in favour not only of the landholder, but also of the tenant.

The decision in *Madai Thalavoy Kummarasamy Mudaliyar* v. *Nallakannu Tevan*(1) is, no doubt, opposed to this view, but in that judgment sufficient effect was not given to the fact that an appeal is allowed by section 43. Nor do we see any serious injustice in adopting the view we have taken. In the present case

(1) 5 M.H.C.R., 289.

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DONTARAJU SUBBARAYUDU v. NEKALAPUDI LINGAYYA.

a tenant who alleges that he possesses a saleable interest would be subjected to serious hardship if no appeal lay.

It is scarcely necessary to point out that the police officer who has to execute the warrant in the event of the tenant's appeal under section 43 being decided against him, should postpone delivery until the expiry of the 30 days allowed for an appeal, and, if an appeal is made, delivery of possession may be stayed by the Court.

We therefore hold that an appeal lay in the present case to the District Court.

The case came on for final hearing before (Subrahmania Ayyar and Miller, JJ.) when the Court delivered the following judgment.

JUDGMENT—Following the opinion of the Full Bench the decree of the lower Appellate Court is reversed and the appeal is remanded to it for disposal according to law.

The costs will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

1906. July 10 11, 12. 1907. August 5.

JOTI KURUVETAPPA AND OTHERS (DEFENDANTS NOS. 1 TO 5 AND FIRST DEFENDANT'S LEGAL REPRESENTATIVE), APPELLANTS IN APPEAL SUITS NOS. 38 AND 74 OF 1903,

v.

IZARI SIRUSAPPA AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 11, 12, 14 TO 19 AND LEGAL REPRESENTATIVE OF NINETEENTH DEFENDANT), RESPONDENTS IN BOTH.*

Civil Procedure Code, Act XIV of 1882, s. 375—'Lawful agreement or compromise'—'Relates to the suit'—Compromise in a suit for money by which the agreed amount is charged on property is lawful and the relief by way of charge 'relates to the suit.'

The language of section 375 of the Code of Civil Procedure is wide and general and does not preclude parties from settling their disputes on such law-

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* Appeals Nos. 38 and 74 of 1903, presented against the decrees of Lewis Moore, Esq. District Judge of Bellary, in Original Suits Nos. 15 and 16 of 1898.

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ful terms as they might agree to without being restricted to such relief as one only of the parties had chosen to claim in the plaint.

In a suit for money, where the plaint prays for a simple money decree, an agreement, by which the parties agree that the amount decreed according to the compromise should be a charge on certain properties, is 'lawful' and 'relates to the suit' so as to be embodied in the decree.

THE facts of the case are fully set out in the judgment.

P. R. Sundara Ayyar and *K. Srinivasa Ayyangar* for second to sixth appellants in Appeal Suit No. 38 of 1903.

K. Srinivasa Ayyangar and *S. Srinivasa Ayyangar* for second to sixth appellants in Appeal Suit No. 74 of 1903.

The Hon. Mr. *P. S. Sivaswami Ayyar* for first respondent in both.

JUDGMENT.—*In Appeal No.* 38 *of* 1903—The plaintiff is the head of a mutt in the Bellary district. A predecessor of his brought Original Suit No. 17 of 1880 in the Sub-Judge's Court of the district against the principal members of the family of defendants Nos. 1 to 5, on certain bonds for money said to have been executed by Santhappa (the father of the first defendant) and Basalingappa (the father of the third defendant) as managers of the family. The claim of the plaintiff was adjusted by a compromise entered into between him and the defendants in the suit, except the then second defendant. By that compromise it was agreed that the plaintiff was to receive Rs. 7,828–4–10 and costs Rs. 1,685–13–6 in eleven equal instalments, and the amount was made a charge on certain immoveable property of the defendants, with interest at 12 per cent. in default of regular payment. The compromise was communicated to the Court which recorded it and passed a decree in accordance therewith in 1883. The decree was assumed to contain an order for sale of the property in default of regular payment until 1897, when it was decided in execution proceedings between the parties that the decree-holder was not entitled to enforce the charge otherwise than by a suit. As a result of that order, the present suit was filed to recover the balance due, viz., Rs. 19,275–10–7 by sale of the property charged.

The District Judge gave a decree in favour of the plaintiff except in respect of the amount payable for the first and second instalments, the recovery of which he held was barred by limitation.

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JOTI KURUVETAPPA v. IZARI SIRUSAPPA.

The defendants Nos. 1 to 5 appeal against the decree so far as it is against them, and the plaintiff files a memorandum of objections in regard to the two instalments disallowed. In the appeal, the question raised by all the appellants in common is as to the validity of the charge purported to have been created by the decree. The argument is that the claim of the plaintiff in Original Suit No. 17 of 1880 was only for money due under bonds which gave no charge on the defendants' property, and that it was therefore not competent to the Court to give a decree creating a charge even though the defendants agreed to such a charge as one of the terms of the compromise to be embodied in the decree. Section 375 of the Civil Procedure Code provides "If a suit be adjusted wholly or in part by any lawful agreement or compromise or if the defendants satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final, so far as it relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction."

We see nothing in this language to preclude the Court from embodying in the decree the charge which the parties agreed to as security for the debt. The agreement was "lawful," and it "relates to the suit," that is, to the matter of the claim in the case. In the claim as made in the plaint there was, it is true, no prayer to have the amount charged on the property, but there is nothing in principle or in the language of the section which we have quoted to restrict the relief to be granted in accordance with a compromise to what is prayed for in the plaint or less. If that were the intention of the legislature it would have found no difficulty in expressing the intention in suitable language. On the contrary, the language used is wide and general, and it is obvious that it would be highly inconvenient if the parties should not be allowed to settle their disputes on such lawful terms as they might agree to without being restricted to such relief as one only of the parties had chosen to claim in the plaint. No doubt the language employed by this Court in the case of *Venkappa Nayanim* v. *Thimmappa Nayanim*(1) which was followed in *Muthuvijaya*

(1) I.L.R., 18 Mad., 414.

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Ragunatha Udayana Tevar v. *Thandavaraya Tambiran*(1) lends some support to the contention of the appellants. But in that very case the actual decision shows that the Court allowed reliefs not claimed in the plaint, but agreed to by the parties as part of the compromise. In these circumstances we do not feel compelled to accept the restricted construction of section 375 involved in the language of the Court in that case.

We are therefore unable to accept the appellants' contention on this point, and we hold that the charge created by the decree in Original Suit No. 17 of 1880 is valid. In this view it is unnecessary to consider the other contentions urged on behalf of the appellants on the footing that the Court had no power to charge the property by its decree.

On behalf of the first defendant the further contention was raised that the compromise was without the sanction of the Court and therefore was not binding on him as he was a minor at the time. On behalf of defendants Nos. 4 and 5 it was also urged that as they were not impleaded in Original Suit No. 17 of 1880, no decree should have been given against them without trying the defence which they raised to the effect that the debt was one not binding on them as members of a joint family. No findings have been given by the District Judge on these contentions and no reasons are stated for considering that no findings are necessary. In our opinion they go to the root of the case against these defendants and must be decided. As regards the memorandum of objections it has been urged that if the time during which the execution petition filed on the 25th November 1895 and disposed of on the 13th December 1897 was pending be excluded in computing the period of limitation, the suit would not be barred in respect of the first and second instalments. Assuming that these proceedings were prosecuted with due diligence the plaintiff would be entitled under section 14 of the Limitation Act to the exclusion of that time in computing the period of limitation.

We must therefore ask the District Judge to submit findings on the following issues:—

(1) Was the compromise entered into on behalf of the first defendant by his then guardian *ad litem*?

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(1) I.L.R., 23 Mad., 214.

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JOTI KURUVETAPPA v. IZARI SIKUSAPPA.

(2) Was the compromise sanctioned by the Court on behalf of the minor?

(3) Were the debts contracted from plaintiff's predecessor for the family purposes of fourth defendant and fifth defendant and are these defendants liable to plaintiff to satisfy his present claim?

(4) Were the proceedings in E.P. No 41 of 1895 prosecuted with due diligence by the decree-holder?

Fresh evidence on both sides may be taken. The findings should be submitted within two months. Ten days will be allowed for filing objections.

JUDGMENT.—*In Appeal No.* 74 *of* 1903—For the reasons stated in our judgment in appeal No. 38 of 1903 we hold that the charge created by the decree is valid; but we will ask the District Judge to submit a finding on the following issues, viz.:—

(1) "Was compromise entered into on behalf of the first defendant by his then guardian *ad litem*?

(2) "Was the compromise sanctioned by the Court on behalf of the minor?

(3) "Were the debts contracted from plaintiff's predecessor for the family purposes of fifth defendant and is this defendant liable to plaintiff to satisfy his present claim?

(4) "Were the proceedings in E.P. No. 43 of 1895 prosecuted with due diligence by the decree-holder?

Fresh evidence on both sides may be taken. The findings should be submitted within two months. Ten days will be allowed for filing objections.

In compliance with the above judgments, the District Judge submitted the following

FINDINGS.—I return my findings on the issues set out in the concluding paragraph of the High Court's judgment in Appeal No. 38 of 1903 (Original Suit No. 15 of 1898 of the District Court, Bellary).

The Vakils agreed that such fresh evidence as was taken should be considered as far as might be . . . . common to both Suits Nos. 15 and 16 of 1898. Five witnesses were examined for the pliantiff and none for the defendants.

1*st issue.*—The compromise itself is not on record and the same remark applies to all the original documents connected with Suits Nos. 17 and 19 of 1880, which are the predecessors of Suits Nos. 15 and 16 of 1898, respectively. The plaintiff, therefore, has

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JOTI KURUVETAPPA v. IZARI SIRUSAPPA.

been put to great difficulty in proving after this lapse of time any affirmative proposition he wishes to make. It appears from exhibit C (page 29 of the documents printed in Appeal No 38 of 1903) the decree in Original Suit No. 17 of 1880, that the Razinamah was filed by all the parties. So also the decree in Original Suit No. 19 of 1880 recites (see exhibit A printed at page 19 of the documents in Appeal No. 74 of 1903) that the Razinamah was put in by both parties.

Exhibits D and G show that first defendant's guardian along with the other defendants was being allowed time to pay up the amounts decreed. It is not denied that the compromise was entered into by first defendant's then guardian *ad litem*. Defendants Nos. 2 and 4 in Original Suit No. 15 of 1898 who are the third and fourth defendants in Original Suit No. 16 of 1898, are still alive. They have not been called to maintain the negative. I have no hesitation whatever in finding the first issue in the affirmative.

2nd issue.—First defendant was not a minor when the Suits Nos. 15 and 16 of 1898, were filed—he was a minor only at the time of the compromise. From 1883 to 1898 no question of the Court's sanction was ever raised. In the absence of records and owing to the death of Vakils engaged, it is impossible to say that the trying Judge expressly sanctioned the compromise in so many words. Looking to the fact that the debts were incurred mostly on Santhappa's scrip, it seems to me the height of impudence for the first defendant who claims to be the adopted son of Santhappa's son to contend that the compromise is not shown to have been for his benefit. By the compromise plaintiff give up a portion of his claim and other persons eased the burden primarily resting on the shoulders of Santhappa and his brother's son Basalingappa who were the joint managers of the family and the persons who had made themselves responsible on the bonds. All I can say on this issue is that I should have sanctioned the compromise on behalf of the minor had the matter come before me as Judge. The evidence taken now and on previous occasions shows the family to be a joint agricultural family living in patriarchal style. Owing to the long time it was engaged in this litigation and the difficulty on the part of outsiders in getting precise information about the changes in the families due to deaths, there have been omissions in bringing individual names on to the record,

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For instance, in Suit No. 17 of 1880 the fourth brother Chenna Veerappa's branch was, through ignorance, not brought on the record, and in Suit No. 19 of 1880 only two of three sons of the said Chenna Veerappa were brought on. All the branches, however, recognized the family nature of the expenditure by joining in the compromise decree—the fifth defendant alone taking advantage of the fact that his name was by oversight not included as one of Chenna Veerappa's sons contests the point.

Whether the expenditure of so large a sum on tank irrigation was beneficial or not is not a matter which affects the character of the expenditure *qua* family expenditure. It was thought by those in the family who had the management of its affairs and who were considered most competent to judge that it would be beneficial and it was acquiesced in by the other members. That it has turned out as a matter of fact to be an unfortunate undertaking in nowise affects the character of the outlay which was a legitimate one for an agricultural family to embark on. There may have been want of foresight or wrong calculations or insufficient knowledge: all that can now be said is that the undertaking might have turned out well and it has turned out badly. The same might be said of many legitimate commercial undertakings which fail but which could not for that reason be stigmatised as speculative, wild or immoral. Therefore, I cannot attach any weight to the contention that the minor defendants were not benefited by the expenditure undertaken by the adult members of the family and I answer both parts of the third issue (remanded) in the affirmative.

4th issue.—Execution proceedings were pending from 25th November 1895 till 13th December 1897. On the former date E.P. No. 41 was put in and an order for sale was made. Exhibit E (page 33 of printed paper in Appeal No. 74) is an application by defendants, dated 9th September, 1896, asking for three months' time to pay, plaintiff having agreed to the extension. This was allowed by the District Judge on 13th August. Plaintiff must have again applied for sale as on 28th January 1897 the plaintiff and defendants put in a joint petition (exhibit D) to allow one and a half months' time for payment. This petition seems to have been received in the District Court on 6th February 1897. One and one-third months from February would bring the time near the Court's recess and in June 1897 the Sub-Court was

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stationed at Bellary. On 3rd September 1897 the defendants turned round, took various legal objections to the plaintiff's application for sale and drove him to bring fresh suits. I am unable to find in the history of the execution proceedings that plaintiff was guilty of negligence. The extensions granted after order for sale was made, were, on the representation of the defendants that the amount was a large one and they could not pay it up at once. The periods of grace asked for—three months, and one and a half months—were not in the circumstances excessively long. I find the fourth issue in the affirmative.

These Appeals and the Memoranda of objections coming on for final hearing after the return of the above findings, the Court delivered the following

JUDGMENT.—As regards the binding character of the debts we have no hesitation in agreeing with the District Judge that the loans were raised for purposes binding on the family. The oral evidence is all in one way, and the conduct of the adult members of the family who were not parties to the compromise is consistent with no other view. Among the parties to the compromise there was an adult male member who was not a party to the instrument under which the loan was raised, and his being impleaded was on account of his having become the manager of the family at the time of the suit. These circumstances, coupled with the fact that no objection was taken to the proceedings taken in execution from 1883 to 1897, fully warrant our conclusion. As regards the first defendant's contention that the compromise was not sanctioned there is oral evidence that it was sanctioned. This evidence is uncontradicted and as all the record except the compromise has been destroyed and the Vakils are dead, we are unable to hold that the plaintiff has failed to discharge the onus that is on him on this question. We therefore dismiss the appeals with costs of the plaintiffs. We allow the memoranda of objections as regards the first and second instalments and the decree of the lower Court will be modified in this respect with costs throughout on these sums.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Boddam and Mr. Justice Wallis.

1907.
April 22, 25
July 23.

PINDIPROLU SOORAPARAJU (PLAINTIFF), APPELLANT,

v.

PINDIPROLU VEERABHADRUDU AND OTHERS (DEFENDANTS Nos. 6, 1 TO 5 AND 7), RESPONDENTS.*

Hindu Law, reversioners—Agreement to divide reversion when it should fall in, creates no vested right, but only right to claim specific performance.

Three brothers *S*, *R* and *K* and their father made an arrangement which amounted to a division of the family properties. The father and *R* and *K* continued, however, to live together. The father died first and then *R*, leaving him surviving *A* his widow and *B* his daughter. *A* and *B* did not claim *R's* share, but were content with maintenance. There was, however, no surrender by *A* of her rights. *S* and *K* entered into an agreement between themselves to the effect that *K* should enjoy *R's* share and maintain *A* and *B*, *S* being given a small piece of land at once and that after *A's* death, *S* was to take half of *R's* share. *B* died unmarried in *A's* life-time and *S* predeceased *A* who died in 1891. In a suit brought in 1901 by the son of *S* to recover one-half share of *R's* property:

Held (WALLIS, J., dissenting) that *K* and *S* were expectant reversionary heirs and the agreement between them was in effect to divide the reversion when it should fall in. The right of *K* as such presumptive reversionary heir was incapable of transfer on the principle embodied in section 6 of the Transfer of Property Act, and the agreement did not operate to vest any property in *S* as from the date of agreement and the suit was not therefore maintainable.

Per BODDAM, J.—The agreement gave only a right to claim specific performance thereof when the reversion should fall in, which right became barred as it was not enforced within the statutory period after the death of the widow.

Per WALLIS, J.—The widow not having claimed her husband's share and having contented herself with maintenance, *S* and *K* were not in the position of expectant heirs, although the widow by asserting her right might have reduced them to that position. Under the circumstances the agreement was something more than a mere contract in the part of *K* to convey to *S* a half share on the widow's death. The effect of the agreement was to give *S* a vested interest in a half share in the lands to take effect in possession on the widow's death and the suit was therefore maintainable.

SUIT for possession of land.

Plaintiff alleged that his father Subbanna, Krishnayya, the father of the first defendant and paternal grandfather of defendants

* Second Appeal No. 1466 of 1904, presented against the decree of M.R.Ry. T. Varada Row, Additional Subordinate Judge of Godavari at Rajahmundry, in Appeal Suit No. 129 of 1902, presented against the decree of M.R.Ry. V. Krishnamurti, District Munsif of Cocanada, in Original Suit No. 111 of 1901.

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Nos. 2 to 6, and one Rajagopaludu were brothers, and that they became divided long ago and lived separately. Krishnayya and Rajagopaludu carried on their cultivation jointly. Rajagopaludu died leaving a widow and daughter him surviving. Krishnayya took possession of the property left by Rajagopaludu. Thereupon, the plaintiff's father, Subbanna, claimed a moiety of the property. An agreement (exhibit A) was come to between Krishnayya and Subbanna in May 1837, whereby, the former undertook, in consideration of his being permitted to enjoy the property of Rajagopaludu during the lifetime of his widow, not to encumber the property in any way, to perform the marriage ceremonies of Rajagopaludu's daughter, and give her 4 acres of land as dowry, and maintain the widow; and agreed that the land should, on the widow's death, be divided between himself and Subbanna. The daughter died unmarried and the 4 acres agreed to be given to her remained in the possession of Krishnayya. Krishnayya having neglected to pay the widow's maintenance, she filed Original Suit No. 267 of 1846 in the Peddapur District Munsif's Court against the two brothers and obtained a decree directing Krishnayya to pay her Rs. 12 annually and Subbanna Rs. 2 annually for clothes. Subbanna predeceased the widow who died on the 15th May 1891. After his death, the plaintiff called upon Krishnayya to effect a division, but the property remained in the enjoyment of the latter up to his death. The defendants Nos. 1 to 6 having refused to divide and give plaintiff his share therein, he brought this suit.

Defendants pleaded, *inter alia*, that the agreement (exhibit A) was not genuine and that plaintiff could claim nothing under it. The material portion of exhibit A is as follows :—

"Khararnama sannad executed on Saturday the 2nd Vaisakha Suddha of Havilambi (6th May 1837) in favour of the elder brother Pindiprolu Subbanna Garu by his younger brother Krishnayya. While we brothers enjoying the property of lands, etc., as per settlement formerly made by our father Lakshmana Kavi Garu, my elder brother and your younger brother Rajagopaludu and our father Lakshmana Kavi Garu were till now living jointly with me and they died. So the particulars of agreement we have both entered into are—that, since Rajagopaludu had no sons and since his share was in my possession I should perform the marriage of his daughter and we should both consent

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PINDIPROLU SOORAPARAJU v. PINDIPROLU VEERA-BHADRUDU.

and give that girl for her 'pasupu kunkuma' (pin money) as per our father's orders land of *K* half 'Pally Pandum' (ten tooms seed area) out of Rajagopaludu's share, that I should pay the maintenance allowance of Rajagopaludu's widow from out of the remaining land; that you should never have any concern in Rajagopaludu's house-site; that I should give up forthwith the 'Pati' site held by me till now to the east of your site and I should hold the entire 'Pati' site near my house; that we should after the death of Rajagopaludu's wife divide into two equal shares the land remaining after excluding the ten tooms of land given to the girl and the house-site given me and each pay three rupees of kattubadi."

The District Munsif held that exhibit A was genuine and that plaintiff had acquired a right under it to his share in the plaint properties and decreed in his favour.

On appeal this decree was confirmed with some modifications.

The plaintiff appealed and first and seventh respondents put in memorandum of objections.

V. Ramisam for appellant.

T. V. Seshagiri Ayyar for first respondent.

T. V. Muthukrishna Ayyar for seventh respondent.

The appeal first came on for hearing before (Sir Arnold White, C.J., and Wallis, J.) when their Lordships delivered the following judgments:—

Sir ARNOLD WHITE, C.J.—I think this case must be dealt with on the footing that the three brothers, viz., the plantiff's father Subbanna, the first defendant's father Krishnayya, and Rajagopal, had, before the agreement of 1837 entered into between Subbanna and Krishnayya, become divided in status. The plaintiff's claim to possession of quarter of the property now in the possession of the first defendant's family is based on the agreement of 1837. When this agreement was entered into the rights of the two brothers were rights in reversion on the death of Rajagopal's widow. I do not think that the agreement operated so as to vest half of the property in Subbanna as from the date of the agreement. On the death of Rajagopal the right of succession to the property was in the widow. She was no party to the agreement of 1837 and never renounced her rights of succession. There is nothing to show she was aware of the agreement. In her suit for maintenance her claim was not against Krishnayya

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under the agreement but against both brothers under the general law. The two brothers could not of course divest the widow of her rights by an agreement between themselves. Krishnayya's right was only that of a presumptive reversionary heir and this right on the principle of law embodied in section 6 of the Transfer of Property Act, he could not convey to Subbanna. See *Manickam Pillai* v. *Ramalinga Pillai*(1). On the death of the widow the party entitled to the property as reversioner was Krishnayya—Subbanna having predeceased the widow. The agreement of 1837 being in my view ineffective for the purpose of conveying any title to Subbanna, I think the plaintiff's suit fails and should be dismissed.

WALLIS, J.—I think the decree of the District Munsif is right. Subbanna, Rajagopal and Krishnayya were three brothers and during the life-time of their father it would appear from recitals in exhibit A which are the only sources of information that a settlement was made which probably amount to a partition, but that after it the two younger brothers and their father continued in joint possession of a portion of the family property, in which case they would, if there had been a partition, have been tenants in common. The father died first and then one of the brothers Rajagopal leaving a widow and daughter. If there had been a partition the widow and the daughter were his heirs, but they do not at any time appear to have made any claim to the property and possibly were not in a position to show that what had taken place in the father's life-time amounted to a partition. For whatever reason they never claimed to succeed to Rajagopal's share but where content with maintenance. Under these circumstances, I do not think the two brothers were under any legal duty to advise them as to their rights or to give them what they did not claim. After Rajagopal's death the recitals in exhibit A show that a question arose as to the respective rights of Subbanna and Krishnayya to succeed to Rajagopal's share, and they agreed as between themselves that Krishnayya was to maintain the widow, that a piece of land was to be given to the daughter, and that Subbanna was to get a small piece of land at once and ultimately half of Rajagopal's share but not until the widow's death. This settlement was embodied in exhibit A and the effect of it was in my

(1) I.L.R., 29 Mad., p. 120.

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PINDIPROLU SOORAPARAJU v. PINDIPROLU VEERA-BHADRUDU.

opinion to give Subbanna a vested interest to the lands to take effect in possession on the widow's death. It is in my opinion something more than a mere contract by Krishnayya to convey a share to Subbanna on the widow's death as it does not recognize any title in Krishnayya to the whole property, but without going into that question provides by way of settlement between the two brothers that Krishnayya is to have the whole of Rajagopal's share with the exception mentioned above for the widow's life and that Subbanna is to take half at her death. The two brothers when executing exhibit A were not in my opinion in the position of expectant heirs, although the widow might possibly have succeeded in reducing them to that position by proving that there had been a legal partition in the life-time of Rajagopal, but she made no such attempt or claim, and the two brothers in exhibit A were dealing with property of which one of them was in actual possession and to which there was apparently no other claimant forthcoming. Even if the two brothers were under a legal duty to advise the widow and her daughter as to their rights, the recitals in exhibit A do not show clearly and beyond all doubt that there had been a partition which would have entitled her to succeed as heiress to her husband. Exhibit A of course did not bind the widow and when her maintenance fell into arrears she ignored it and sued both brothers which was her proper course if there had been no partition in Rajagopal's life as the joint family property in the hands of both brothers would have been liable for her maintenance. In that trial, exhibit B was produced by Subbanna and relied on apparently by him as an answer to the suit as against him. It was not then suggested, and apparently did not occur to anybody that there was anything fraudulent or illegal about exhibit A and any such fraud or illegality, should, I think, be very strictly proved by Krishnayya's representatives when as defendants in the present suit they seek to escape from performing the terms of an agreement of which they have enjoyed the benefit. In my opinion they have failed to prove any such fraud or illegality. As I think the plaintiff's right to possession only arose on the widow's death in 1891, I agree with the District Munsif that article 144 of the Limitation Act is applicable and that the suit is in time. I cannot agree with the Subordinate Judge that there must be an enquiry as to what items were in possession of Rajagopal, as exhibit A shows that even if there

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had been a partition Krishnayya and Rajagopal continued in possession of their shares as tenants in common without any partition by metes and bound. As to items 12 and 120 dealt with in the ninth issue, if, as is not denied, they formed part of the lands dealt with by exhibit A and were in the possession of Krishnayya at the date of exhibit A, the plaintiff is entitled to have them taken into account in giving the plaintiff a fourth share of the whole undivided shares of Krishnayya and Rajagopal whether Krishnayya and his representatives have parted with possession of them or not. With regard to seventh issue, there is no evidence that any property was ever given to the daughter and I would therefore restore the District Munsif's decree by giving the plaintiff a fourth share of the properties claimed in the plaint.

[Owing to the above difference of opinion, the appeal was referred to Boddam, J., under the provisions of section 575 of the Code of Civil Procedure. The appeal was accordingly heard by his Lordship who delivered the following.]

JUDGMENT.—The suit was brought to establish the plaintiff's right to one-quarter of certain land in the possession of the defendant.

Practically, the only question seriously argued before me was the right of the plaintiff to succeed in his action under exhibit A.

It is admitted that the brothers Subbanna Rajagopal, and Krishnayya were divided and that thenceforth Subbanna lived separate though Rajagopal and Krishnayya lived together. After the death of Rajagopal (who left a widow and a daughter) Subbanna and Krishnayya executed exhibit A in 1837. There is nothing to show that Rajagopal's widow knew anything about the execution of exhibit A. At the time of the execution of exhibit A, Krishnayya was in possession of the share of Rajagopal and by exhibit A, Subbanna and Krishnayya purport to deal with his property and arrange that Krishnayya shall maintain the widow, marry the daughter, and remain in possession of substantially the whole of Rajagopal's property; and the document further contains these words "we should after the death of Rajagopal's widow divide into two equal shares the land." The plaintiff's suit depends upon the interpretation to be put on these words in exhibit A in the circumstances under which it was executed.

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PINDIPROLU SOOBAPARAJU v. PINDIPROLU VEERA-BHADRUDU.

It is admitted that the widow never surrendered her estate; but in 1846 the widow brought a suit against Subbanna and Krishnayya for maintenance and alleged that in 1843 they had agreed at her request to pay her Rs. 16 a year, and had paid her one year's maintenance only. At the hearing exhibit A was put in evidence by Subbanna, but in spite of it, a decree was given for the widow directing Krishnayya to pay her Rs. 12, and Subbanna to pay her Rs. 2 per annum. It seems to me tolerably clear from this that the widow when she brought her suit was ignorant that her husband and his two brothers, Subbanna and Krishnayya, were ever divided and she sued the defendants as the widow of a member of an undivided family, of which Subbanna and Krishnayya were the survivors. It is argued that as exhibit A was put in evidence in this suit, and the widow took no steps to assert her right to her husband's lands, she acquiesced in exhibit A. This is, however, immaterial inasmuch as she never surrendered her rights.

The widow died in May 1891. The plaintiff is the son of Subbanna who predeceased the widow and the defendant is the son of Krishnayya who survived the widow. Rajagopal's share had remained in the possession of Krishnayya and the defendant from the time of Rajagopal's death and the plaintiff now claims half of Rajagopal's share under exhibit A.

It is contended that Subbanna obtained under exhibit A a vested interest in half of Rajagopal's share which passed to the plaintiff at his death.

In my opinion exhibit A conveys no title to Subbanna. It is a mere agreement between two expectant reversionary heirs to divide when the reversion falls in. As presumptive reversionary heirs they could not convey their reversionary rights and in my opinion did not pretend to do so by exhibit A. At the death of the widow, therefore, the plaintiff's only remedy in my opinion was to sue Krishnayya for specific performance of the contract made by exhibit A. This right became barred within three years of May 1891 when the widow died. The plaintiff's action therefore fails and should be dismissed with costs throughout.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1907, July 8.

SRIMANT RAJA YARLAGADDA MALLIKARJUNA PRASADA NAIDU, ZAMINDAR OF CHALLAPALLI (DEFENDANT), APPELLANT IN ALL,

v.

KUCHI JAGGAYYA, GANGAMMA, RAMAYYA, SUBBAYYA PLAINTIFFS (RESPONDENTS) IN SECOND APPEALS Nos. 26 TO 29 OF 1906.*

Rent Recovery Act (Madras), Act VIII of 1865—*Exchange of patta and muchilika not necessary between zamindar and inamdar to enable former to take proceedings under Act.*

No exchange of patta and muchilika is necessary to enable a zamindar to take summary proceedings against an inamdar as his tenant under Madras Act VIII of 1865, even when such inamdar has the kudivaram right in the land held by him.

Lakshmi Narayana Pantulu v. *Venkatarayanam*, (I.L.R., 21 Mad., 116), referred to.

Krishnama Charlu v. *Renga Chariar*, (16 M.L.J., 489), referred to.

THE plaintiffs, who were holders of an Inam in the Zamin of the defendant, brought this summary suit under the Rent Recovery Act to set aside an attachment by the defendant in respect of arrears of rent due by plaintiffs for fasli 1312–3. The main ground on which the plaintiffs impeached the attachment was that the defendant, having tendered no patta to plaintiffs, was precluded from availing himself of the summary procedure under the Rent Recovery Act.

The Deputy Collector and the District Judge, on appeal, held that the distraint was illegal, as no pattas and muchilikas were exchanged.

Defendant appealed to the High Court.

P. R. Sundara Ayyar for appellant.

The Hon. Mr. *P. S. Sivaswami Ayyar* for respondents.

JUDGMENT.—The decision of the District Judge that the distraint by the zamindar was illegal in consequence of his having

* Second Appeals Nos. 26 to 29 of 1906, presented against the decrees of M. D. Bell, Esq., District Judge of Kistna at Masulipatam, in Appeal Suits Nos. 22 to 25 of 1905, presented against the decision of M.R.Ry. P. Nagesa Row, Head-quarters Deputy Collector, Bander, in Summary Suits Nos. 246 to 249 of 1904.

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ZAMINDAR OF CHALLAPULLI v. KUCHI JAGGAYYA.

failed to exchange patta and muchilika with the plaintiffs cannot be sustained.

The plaintiffs are inamdars, and in the Full Bench Case (*Lakshminarayana Pantulu* v. *Venkatrayanam*(1)) and the cases therein referred to, it was decided that such inamdars are not bound to exchange pattas and muchilikas with the zamindar, but can be proceeded against as tenants under the summary provisions of the Rent Recovery Act. It is argued for the inamdars (respondents) that they are also the holders of the kudivaram or ryot's share in the inam lands, and that therefore the zamindar is prohibited from proceeding against them by distraint, unless he has given them a patta. But this contention is not valid. The inamdar's liability to pay *jodi* or quit-rent to the zamindar has not its source in the kudivaram rights of the inamdars, but in their right to the melvaram, as is apparent from Exhibit II. In a very similar case (*Krishnamacharlu* v. *Ranga Chariar*(2)), it was expressly held that "the circumstance that the plaintiff happens to possess the kudivaram right in the property in respect of which he is also inamdar bound to pay 'russum' to the landholder does not alter the case or impose upon the landholder an obligation which would not otherwise subsist between him and the inamdar."

We must, therefore, set aside the decree of the District Judge based on this preliminary point, and remand the appeals to him for disposal according to law. Costs in this Court will abide the result.

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(1) I.L.R., 21 Mad., 116. (2) 16 M.L.J., 489.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

CHINNAPPA ROWTHAN (PLAINTIFF), APPELLANT, — 1907. April 9, 10. July 18, 25.

v.

ROBERT FISCHER (DEFENDANT), RESPONDENT.*

Merger—Decree in civil suit for rent bars subsequent summary proceedings under Rent Recovery Act by distress—Rent Recovery Act (Madras), Act VIII of 1865, *s.* 39.

A cause of action merges by reason of the judgment of a Court of record in a suit brought on such cause of action and without the judgment being satisfied.

King v. *Hoare*, (13 M & W., 494), referred to.

A claim for rent is a single cause of action although it may be recovered either by distress or by suit, and when the landlord sues for the rent in a Civil Court, such claim merges in the judgment passed in such suit and can no longer be distrained for under the Rent Recovery Act.

THE plaintiff, a ryot of the Salem mitta, brought this suit under sections 48 and 50 of Madras Act VIII of 1865 against the defendant, who was the usufructory mortgagee of the mitta, to set aside an attachment of land under the Rent Recovery Act for arrears of rent alleged to be due by plantiff for fasli 1310.

The defendant having tendered plaintiff a patta for fasli 1310 and plaintiff having objected to same, the defendant took action in the Revenue Court alleging that the patta tendered was proper. The Revenue Court found that the patta was legal and directed acceptance of the patta by plaintiff.

The defendant also filed a civil suit against plaintiff for recovery of rent for the same fasli.

The District Munsif before whom the suit was filed, held that some of the conditions of the patta were improper, and gave a decree for a smaller amount. On appeal, the District Court held that the patta having been found improper, no decree for any rent should have been given, and dismissed the suit. Subsequent to this decision, the defendant took proceedings by way of distress under section 39 of the Rent Recovery Act in accordance with

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* Second Appeal No. 785 of 1905, presented against the decree of M.R.Ry. S. Gopalachariar, District Judge of Salem, in Appeal Suit No. 273 of 1902, presented against the decision of the Court of the Head-Quarters Deputy Collector of Salem, in Summary Suit No. 13 of 1902.

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CHINNAPPA ROWTHAN v. ROBERT FISCHER.

the decision of the Revenue Court which was in his favour. The plaintiff sues to set aside this distraint. The Deputy Collector held that the attachment was legal and dismissed the suit. This was confirmed on appeal by the District Court. In his judgment the District Judge observes as follows :—

"Plaintiff (appellant) now urges that because the patta was found improper in the regular suit, the attachment made by defendant's principal cannot be valid. But he admits that he did not bring to the notice of the lower Court the decision of the District Munsif, while the lower Court's judgment herein is dated 30th June 1902. Further, it seems to me that, so far as proceedings under the Rent Act are concerned, defendant's principal was warranted and protected by the decision of the Revenue Court above referred to. See also *Muttukumarappa* v. *Arumuga*(1) and *Vedachalla Gramani* v. *Boomiappa Mudaliar*(2). It is perhaps not desirable to allow such a conflict, but, as the law stands at present, there is nothing to deprive the force of the decision in the Revenue Court upon which the attachment was based. It being found, in Appeal Suit No. 272, that the said decision should be upheld, the appeal fails and is dismissed with costs."

T. R. Venkatrama Sastri for *T. Subrahmania Ayyar* for appellant.

T. Rangachariar for respondent.

JUDGMENT.—It is urged in support of the appeal that the appellant is entitled to succeed on the ground that the summary attachment was illegal, because at the date of the attachment, the defendant had obtained a civil judgment for the amount of the rent, which was at that time executable although that judgment was under appeal and has since been reversed. In giving judgment in another case to which the present respondent was a party (*Venkatachelapati* v. *Robert Fischer*(3)), we observed that it might be that, where a landlord obtains a decree for rent in a civil suit, the debt would merge in the decree, and further summary proceedings become illegal (*Chancellor* v. *Webster*(4)). It was unnecessary to decide the point in that case, but, on reconsideration and after hearing argument, we are still of the same opinion. According to the doctrine of merger as laid down in *King* v.

(1) I.L.R., 7 Mad., 145.
(2) I.L.R., 27 Mad., 65.
(3) I.L.R., 30 Mad., 444.
(4) 9 T.L.R., 568.

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Hoare(1), if there be any cause of action by one against another, and judgment be recovered in a Court of record, the judgment is a bar to the original cause of action which, as it is said *transit in rem judicatam*. It is quite clear that cause of action merges by reason of the judgment and without such judgment being satisfied. There is nothing opposed to this view in *Wegg Prosser* v. *Evans*(2), or in *Drake* v. *Mitchell*(3), which it followed. In both these cases there were two causes of action as pointed out by Rigby, L.J., the original debt contracted by the several joint contractors and the bill or cheque given by one of them as collateral security, and all that was decided was that judgment against such joint contractor on the bill or cheque would not by itself merge the right of action on the original debt which was a different cause of action, and that a judgment on the collateral security could only affect the right of action on the original debt when such judgment was satisfied. Here, there is clearly only one cause of action, rent due, which may be recovered either by distress or suit. In our opinion, the judgment in the civil suit for rent merges the cause of action for rent, and such rent can no longer be distrained for. The doctrine of merger under these circumstances is an application of the maxim *Nemo debet bis vexari pro unâ et eadem causa* which we consider applicable to the circumstances of this country and to the present case. It would, we think, be very inconvenient and oppressive to allow the property of the tenant to be proceeded against simultaneously in execution of the civil decree and by distress. There is, in our opinion, nothing in the terms of the Rent Recovery Act to compel us to hold that a landlord is entitled to go on distraining for arrears of rent after his cause of action has merged in a decree for such arrears. We must, therefore, reverse the decrees of the lower Courts, and set aside the attachment with costs throughout.

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(1) 13 M & W., 494.
(2) (1895), 1 Q.B., 108.
(3) 3 East., 251.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. April 29. July 17, 18, 25.

SELLAPPA CHETTYAR THROUGH HIS AUTHORISED AGENT. RAMASAMI AYYAR (PLAINTIFF), APPELLANT,

v.

VELAYUTHA TEVÁN (DEFENDANT), RESPONDENT.*

Res judicata *in rent suits—Objection to terms of patta not taken in previous summary suit cannot be taken in suits for subsequent year.*

Where the tenant in a summary suit brought against him to enforce acceptance of patta, does not object to some stipulations in the patta, and the judgment directs him to accept a patta containing such stipulations, such judgment is a bar to the tenant setting up the same objections in a suit to enforce patta for a subsequent year.

Venkatachalapati v. *Krishna*, (I.L.R., 13 Mad., 287), followed.

Payments of a voluntary nature cannot be included in the patta unless they constitute a charge on the land or are payable with rent according to established law or usage.

THE plaintiff, a zamindar, sued to enforce acceptance of patta by the defendant, his tenant. The defendant objected to the inclusion in the patta of certain payments to chattrams, temples, etc. On behalf of the plaintiff it was contended that, in a previous suit by him against this defendant, the defendant was directed to accept a patta containing the conditions now objected to, and that the defendant was barred by *res judicata* from objecting to those conditions.

The Deputy Collector held that the previous judgment was no bar, and directed the patta to be modified.

Both parties appealed, and the District Court held that, although the previous judgment would be *res judicata*, there was no evidence to show the precise terms of the patta approved finally in that suit, and he accordingly directed the acceptance of the patta with some further modifications.

Plaintiff appealed to the High Court.

P. R. Sundara Ayyar for appellant.

The Hon. Mr. *P. S. Sivaswami Ayyar* for respondent.

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* Second Appeal, Nos. 476 and 477 of 1906, presented against the decrees of H. Moberly, Esq., District Judge of Tanjore, in Appeal Suits Nos. 1318 and 1324 of 1905, presented against the decision of Mahdi Hussain Sahib, Deputy Collector of Tanjore Division, in Summary Suit No. 1192 of 1905.

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JUDGMENT.—The District Judge states in his judgment that "there is absolutely no evidence, that Exhibit J is a copy of the patta approved of by this Court in its judgment (Exhibit F) in Appeal Suits Nos. 338 and 339 of 1899, and referred to in Exhibit C," and he therefore holds that the present suit is not *res judicata* by reason of the decision in those judgments. It is now admitted before us that the statement of the District Judge as regards the patta is erroneous. The patta, acceptance of which is sought to be enforced in the present suit, is similar in its terms to the pattas, acceptance of which was enforced in the judgments (exhibits C and F).

The tenant objects to it, as it includes certain fees for temples and the like, which he says are of a voluntary character, and which he is therefore at liberty to discontinue the payment of at any time. No doubt such fees are *primâ facie* of a voluntary character, and cannot be included in the patta unless they are shown to be a charge on the land or to be payable with the rent according to established law or usage (*Siriparapu Ramanna* v. *Mallikarjuna Prasada Nayudu*(1)). But in the former litigation these very fees were entered in the patta which the landlord sought to enforce. No objection was then raised as to their being payable. On the contrary, in Exhibit F, the District Judge says: "It is not contended in this appeal that if amanipatta" (*i.e.*, pattas in which the rent is entered as a share of the produce) "could properly be tendered, the particular terms of the pattas actually tendered were improper." Under section 4 of the Rent Recovery Act VIII, of 1865, the patta shall contain *inter alia* the rent payable "including any fees or charges payable with it according to established usage or to law. . . . . and all other sepecial terms by which it is intended that the parties shall be bound." If these fees were not payable according to established usage or law, and if the tenant was not to be bound by their inclusion in the patta, he should have objected to their inclusion in the patta. It was a matter which might and ought to have been made a ground of defence in that suit As it was not, we think, that the decision in that suit renders the present plea *res judicata* (*Venkatachalapati* v. *Krishna*(2)).

We, therefore, set aside the decrees of the Courts below with costs throughout, and direct the acceptance of the patta.

(1) I.L.R., 17 Mad., 43. (2) I.L.R., 13 Mad., 287.

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APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Miller.

1907.
July 11, 22.

ENTHOLI KIZHAKKIKANDY KANARAN (PLAINTIFF), APPELLANT,

v.

VALLATH KOYLIL UNNOOLI AND OTHERS (DEFENDANTS) RESPONDENTS.*

Sale in execution of decree on simple mortgage—Purchaser at such sale cannot maintain suit for possession against purchasers of the equity of redemption subsequent to mortgage but prior to suit, who were not joined as parties.

A, who held lands in kanom tenure, executed a simple mortgage on them in favour of *B* and subsequently sold the properties to *C*. Subsequent to such sale *B* brought a suit on his simple mortgage against *A* without making *C* a party and obtained a decree for sale. *D* became purchaser at the sale held in execution of the decree. In a suit by *D* against *A* and *C* for possession of the properties purchased at the Court sale:

Held, that *D* was not entitled to sue for possession, as all that passed to him at the sale was the right of *B* as a simple mortgagee.

Hargu Lal Singh v. *Gobind Rai*, (I.L.R., 19 All., 541), followed.

SUIT for possession of land.

The facts of the case are sufficiently stated in the judgment.

The Munsif dismissed the suit. On appeal his decree was confirmed. The material portion of the judgment on appeal is as follows :—

"Plaintiff sued to recover a paramba purchased by him at a sale held in execution of the decree in Original Suit No. 333 of 1901 passed against first defendant and another for the amount of the mortgage A. The second, third and fourth defendants claim to hold the land on the transfer deed of 12th January 1890 (exhibit I is copy) executed by first defendant. The District Munsif dismissed the suit. Plaintiff appeals.

The question is whether the plaintiff's claim under the execution sale of 16th August 1902 is valid as against the second to seventh defendants' claim under the transfer deed of 12th January 1890, of which exhibit I is a copy.

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* Second Appeal No. 1433 of 1904, presented against the decree of M.R.Ry. A. Venkataramana Pai, District Judge of North Malabar, in Appeal Suit No. 121 of 1904, presented against the decree of M.R.Ry. M. G. Krishna Rao, District Munsif of Quilandy, in Original Suit No. 259 of 1903.

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ENTHOLI KIZHAKKI-KANDY KANARAN v. VALLATH KOYLIL UNNOOLI.

The plaint land was held by first defendant on kanom kuzhi kanom. She mortgaged it to one Kannan under the original of A, dated 18th December 1888. In Original Suit No. 383 of 1901 a decree (C) was passed for the sale of the land for the mortgage debt and in execution the land was sold when plaintiff became the purchaser—see the sale certificate F, dated 16th August 1902. The opposing defendants resisted the delivery of the land to the plaintiff. Hence this suit to recover the land.

The second to fourth defendants plead that the plaintiff's auction sale F is invalid, that they hold the land as first defendant's assignees under the deed I (copy), dated 12th January 1890.

The mortgagee under exhibit A was however not justified in obtaining the decree (C) upon the mortgage (A) without impleading the subsequent mortgagee under exhibit I and therefore the decree and the sale held in execution thereof are not binding on the second to seventh defendants who are entitled to have an opportunity allowed them to redeem the plaint mortgage A before the property is ordered to be sold for its amount.

On this ground alone, I confirm the District Munsif's decree dismissing the suit and dismiss the appeal with costs."

The plaintiff appealed.

M. Kunjunni Nayar for appellant.

V. Ryru Nambiar for second to eighth respondents.

JUDGMENT.—The first defendant held the paramba in suit on kanom tenure and in 1878 hypothecated it to one P. Kanaran Chettiar, who in 1901 sued with another on the mortgage and obtained a decree for sale. At the auction the plaintiff was the purchaser. After the hypothecation but before the suit thereon, the first defendant assigned all his rights in the paramba to persons now represented by defendants Nos. 2 to 8, and these persons were not made parties to the suit on the mortgage. The plaintiff attempting to take possession under his decree was resisted by defendants Nos. 2 to 8, and has now sued to eject them.

It is contended before us on his behalf that he should be given a decree for possession subject to the right of defendants Nos. 2 to 8 to redeem him within a given time.

The case is on all fours with *Hargu Lal Singh* v. *Gobind Rai*(1), a Full Bench decision with which we agree. The case of *Dadoba*

(1) I.L.R., 19 All., 541.

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ENTHOLI KIZHAKKI-KANDY KANARAN v. VALLATH KOYLIL UNNOOLI.

Arjunji v. *Damodar Raghunath*(1), on which reliance is placed for the plaintiff is distinguishable on the ground that in that case the plaintiff had by his purchase obtained a right to possession. That fact is, it is true, not stated in the report but it is there stated that the circumstances were the same as in *Dullabhdas Devchand* v. *Lakshmanadas Sarupchand*(2), where the report is clear on the point.

In the case before us the plaintiff had no right to possession: all he bought was the mortgagee's right the whole of the equity of redemption being at the date of the sale vested in defendants Nos. 2 to 8 or their predecessor. The mortgagee's right purchased by the plaintiff was only the right of a simple mortgagee the right to enforce a sale and that is the only right which the plaintiff can now exercise against the second to eighth defendants who stand in the shoes of his mortgagor: his suit for possession was rightly dismissed.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Wallis.

1907. February 28.

MARAPU THARALU AND OTHERS (DEFENDANTS Nos. 1, 2 AND 4), APPELLANTS,

v.

TELUKULA NEELAKANTA BEHARA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Landlord and Tenant—Inamdar, tenant under—No presumption that tenant has permanent occupancy right.

The position of Inamdars differs materially from that of zamindars and the presumption that persons becoming tenants of zamindars after the permanent settlement become occupancy tenants does not apply to persons who become tenants under inamdars. *Cheekati Zamindar* v. *Ranasoori Dhora* (I.L.R., 23 Mad., 318), referred to.

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(1) I.L.R., 16 Bom., 486. (2) I.L.R., 10 Bom., 88.

* Second Appeal No. 1299 of 1904, presented against the decree of W.B. Ayling, Esq., District Judge of Ganjam, in Appeal Suit No. 91 of 1904, presented against the decree of M.R.Ry. G. Gangadhara Bomayajulu, District Munsif of Sompeta, in Original Suit No. 616 of 1902.

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MARAPU THARALU v. TELUKULA NEELAKANTA BEHARA.

SUIT by the plaintiffs, inamdars, to recover from the defendants inam lands which, according to plaintiffs, defendants were cultivating as tenants from year to year. Defendants contended that they and their predecessors had been enjoying the lands with permanent rights of occupancy.

The District Munsiff found on the evidence that the defendants were only tenants from year to year, and decreed plaintiffs' claim. His judgment was confirmed on appeal.

Defendants Nos. 1, 2 and 4 appealed to the High Court.

T. V. Seshagiri Ayyar for appellants.

V. Ramesam for respondents.

JUDGMENT.—We think the decree is right. The defendants admit that they became tenants of the plaintiffs' inamdars, but say that they obtained a permanent lease and have occupancy rights. No doubt in *Cheekati Zamindar* v. *Ranasoori Dhora*(1), it is held that persons becoming tenants of zamindars after the date of the permanent settlement presumably become occupancy tenants; but no authority has been cited extending this presumption to inamdars whose position materially differs from that of zamindars, and we are not prepared to hold that, as the case now stands, the same presumption necessarily applies to persons becoming tenants to inamdars. In the present case, we think, the onus of proving occupancy rights or the terms, on which the tenancy subsists, lies on the tenant, as he contends that he is not a tenant from year to year.

The defendants have not proved that their tenancy is a permanent tenancy, or that they have occupancy rights, and their appeal was therefore rightly dismissed. We dismiss this second appeal with costs.

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(1) I.L.R., 23 Mad., 318.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907.
July 22, 25.

AITAMMA (PETITIONER—PLAINTIFF), APPELLANT,

v.

NARAINA BHATTA AND ANOTHER (LEGAL REPRESENTATIVE OF THE DEFENDANTS), RESPONDENTS.*

Limitation Act, Act XV of 1877, *sch. II, art.* 79, *cl.* 6—*Decree directing maintenance from date of plaint is a decree within clause* 6—Res judicata—*Erroneous decision on question of law no bar.*

A decree directing payment of future maintenance from the date of plaint, till death of recipient at a certain rate, is a decree for payment on that date in every subsequent year and the period of limitation for the execution of such a decree is that prescribed by article 179 (6) of schedule II of the Limitation Act.

An erroneous decision on a question of law in a previous application for execution of such a decree does not operate as a bar in a subsequent application to recover arrears which accrued subsequently.

Kaveri v. *Venkamma*, (I.L.R., 14 Mad., 396), followed.

THE plaintiff, the widow of an undivided brother of the defendants, brought a suit, Original Suit No. 39 of 1876, for maintenance against the defendants and the decree dated 6th September 1877 directed the defendants "to pay future maintenance at the rate of Rs. 110 per annum from the date of the plaint (8th July 1876) till her death."

No application for execution was made by plaintiff till 10th September 1884 when she applied for execution for Rs. 125, alleged to be the arrears due to her. The Subordinate Judge rejected the application as barred and the High Court on appeal held that the decree did not direct payment of maintenance to be made at a certain rate within the meaning of clause 6, article 179 of schedule II of the Limitation Act and the application was thereof barred.

The present application for execution was put in on 10th March 1906.

The District Judge held that the High Court having held the decree barred in 1884, it was not executable.

The plaintiff—petitioner appealed to the High Court.

B. Sitarama Rau for *U. Babu Rao* for appellant.

K. Narayana Rau for respondent.

* Civil Miscellaneous Appeal No. 126 of 1906, presented against the order of H. O. D. Harding, Esq., District Judge of South Canara, dated 6th June 1906, made in Execution Petition No. 78 of 1906 in Original Suit No. 39 of 1876.

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AITAMMA v. NARAINA BHATTA.

JUDGMENT.—In 1876 the plaintiff obtained a decree directing the defendants to pay her maintenance at the rate of Rs. 110 per annum from the date of the plaint (8th July 1876) until her death. This, in our opinion, is a decree for payment on the 8th July 1877 and every subsequent year, and the decree is one which directs payment to be made on a certain date within the meaning of clause 6 of article 179 of the Indian Limitation Act (*Lakshmibai Bapuji Oka* v. *Madhavrav Bapuji Oka*(1), *Kaveri* v. *Venkamma*(2)). If this article be applied the present application which seeks only to recover three years' arrears is clearly not barred.

It is said, however, that the case is *res judicata* against the applicant by reason of the judgment in Appeal against Order No. 134 of 1884 in which it was held that a similar application in this suit was barred. No reasons were given for the decision which, in our opinion, is inconsistent with the later decision in *Kaveri* v. *Venkamma*(2). As an erroneous decision on a point of law it does not in our opinion operate as *res judicata*, so as to bar applications to recover arrears of maintenance which have since accrued.

We set aside the order of the District Judge and remand the petition for disposal according to law. Costs will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. July 26, 30.

KUPPUSWAMY AYYAR, RECEIVER, AMMAYYANAIKANUR ZAMIN (DEFENDANT), APPELLANT,

v.

SUPPAN CHETTY (PLAINTIFF), RESPONDENT.*

Rent Recovery Act (Madras), Act VIII of 1865, s. 85—Section 85 empowers receivers to sue under the Act and also makes them liable to be sued without leave of Courts.

A receiver appointed by Court is a public officer holding lands in attachment within the meaning of section 85 of Madras Act VIII of 1865. The section

(1) I.L.R., 12 Bom., 65. (2) I.L.R., 14 Mad., 396.

* Civil Miscellaneous Appeal No. 17 of 1907, presented against the decree of Arthur F. Pinhey, Esq., District Judge of Madura, in Appeal Suit No. 23 of 1906, presented against the decision of A. Edginton, Esq., Sub-Collector of Dindigul Division, in Summary Suit No. 61 of 1905.

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RECEIVER OF AMMAYYANAIKANUR ZAMIN v. SUPPAN CHETTY.

imposes on him the duty of granting pattas to tenants and the liability to be sued under the Act for failure to do so. No leave of Court is necessary to enforce the statutory right of suing such receiver conferred by the section.

SUMMARY Suit under section 8 of the Rent Recovery Act.

The plaintiff was a tenant of the Ammayyanaikanur Zamindary, and the defendant was the receiver placed in charge of the zamin by the District Court.

The Sub-Collector held that the suit against the receiver was not maintainable without the leave of Court.

The District Court reversed this judgment on appeal.

The defendant appealed to the High Court.

The Hon. Mr. *P. S. Sivaswami Ayyar* for appellant.

T. V. Seshagiri Ayyar for respondent.

JUDGMENT.—We agree with the decision of the District Judge. The receiver is admittedly a public officer holding lands in attachment under the orders of a Civil Court within the meaning of section 85 of Madras Act VIII of 1865. By virtue of the section he is to have authority to proceed against tenants in the same manner as the landholder and to have all the powers of a landholder and be subject to the same restrictions. The effect of these last words is, in our opinion, to impose on him the duty of granting pattas to the tenants under section 3, and the liability to be sued under section 8 for failure to do so. Assuming without deciding that but for this section the receiver could not be sued without leave of the Court, we think the effect of the section is to give a statutory right of suit against him under section 85, and that no leave of the Court is necessary. The appeal is dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

MANICKKA ODAYAN (PETITIONER), APPELLANT,

1907.
March 6, 13.

v.

RAJAGOPALA PILLAI AND OTHERS (RESPONDENTS NOS. 1 TO 5 AND 7 TO 14, AND SIXTH RESPONDENT'S LEGAL REPRESENTATIVE), RESPONDENTS.*

Civil Procedure Code, Act XIV, of 1882, *ss.* 244, 310-*A* –*Appeal lies under s.* 244 *against an order rejecting an application under s.* 310-*A by a transferee of judgment-debtor after Court sale.*

The question of setting aside a sale in execution under section 310-A of the Code of Civil Procedure, is a question relating to the execution of the decree within the meaning of section 244 of the Code of Civil Procedure even when the proceeds of such sale are sufficient to satisfy the decree and the auction-purchaser is a person other than the decree-holder.

Srinivasa Ayyangar v. *Ayyathurai Pillai*, (I.L.R., 21 Mad., 416), followed.

The auction-purchaser at a Court sale is the representative of the decree-holder for the purposes of section 244 of the Code of Civil Procedure.

Sandhu Taraganar v. *Hussain Sahib*, (I.L.R., 28 Mad., 87), followed.

Bashir-ud-din v. *Jhori Singh*, (I.L.R., 19 All., 140), not followed.

Mammod v. *Locke*, (I.L.R., 20 Mad., 487), not followed.

The transferee acquiring an interest in the property of the judgment-debtor after such property had been sold in execution, has a right to apply under section 310-A of the Code of Civil Procedure.

Husari Ram v. *Bodai Ram*, (1 Calc.W.N., 279), dissented from.

Erode Manikkoth Krishnan Nair v. *Puttiedath Chembakkoseri Krishnan Nair*, (I.L.R., 26 Mad., 365), followed.

An appeal lies under section 244 of the Code of Civil Procedure against an order passed on an application by such transferee to set aside the sale under section 310-A.

THIS appeal arose in proceedings in execution of the decree in Original Suit No. 1037 of 1903 on the file of the Tindivanam Munsif's Court. Properties belonging to the first defendant were sold in execution on the 28th August 1905 and purchased by various parties. The first defendant on the 18th September 1905 settled all his properties on petitioner, who applied on the 26th September 1905 to set aside the sales under section 310-A of the Code of Civil Procedure. The District Munsif rejected the

* Civil Miscellaneous Second Appeal No. 34 of 1906, presented against the order of F. H. Hamnett, Esq., District Judge of South Arcot, in Appeal Suit No. 193 of 1905, presented against the order of M.R.Ry. S. A. Swaminatha Sastri, District Munsif of Tindivanam, in Miscellaneous Petition No. 258 of 1905.

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MANICKKA ODAYAN v. RAJAGOPALA PILLAI.

application holding that petitioner had no *locus standi* as his interest accrued after Court sale. On appeal the District Judge held that no appeal lay from the decision of the Munsif.

Petitioner appealed to the High Court.

T. V. Seshagiri Ayyar for appellant.

T. Natesa Ayyar for respondent.

JUDGMENT.—This is an appeal from an order of the District Judge holding that no appeal lay to him under section 244, Civil Procedure Code, from an order passed by the District Munsif rejecting an application under section 310-A, Civil Procedure Code, on the ground that it was not made by the judgment-debtor but by a transferee who had acquired the interest of the judgment-debtor after the date of the Court sale.

In our opinion an appeal lay to the District Judge under section 244, as the question was one relating to the execution of the decree and as it arose between the representatives of the parties. That the question of setting aside a sale under section 310-A relates to the execution of a decree was decided by this Court in *Sreenivasa Ayyangar* v. *Ayyathorai Pillai*(1), see also *Chundi Charan Mandal* v. *Banke Behary Lal Mandal*(2). In both these cases the decree-holder was the auction-purchaser but that cannot make any difference on the point whether the question was one relating to the execution of the decree. According to the decision of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*(3), the words of section 244 should not be construed strictly, and even on the strictest construction it is not easy to see how the question whether the decree was or was not to be executed by sale of the judgment-debtor's property could be held not to be a question relating to the execution of the decree, even supposing that the proceeds of the sale sought to be set aside under section 310-A were sufficient to satisfy the decree-holder, so that it was immaterial to him whether the sale was set aside or not under the section.

Assuming it to be a question relating to the execution of the decree, the next question is does it arise between the representatives of the parties to the suit. In *Bashir-ud-din* v. *Jhori Singh*(4) it was held under the circumstances of the present case that no

(1) I.L.R., 21 Mad., 416.
(2) I.L.R., 26 Calc., 449.
(3) I.L.R., 19 Calc., 683.
(4) I.L.R., 19 All., 140.

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MANICKKA ODAYAN v. RAJAGOPALA PILLAI.

appeal lay as the auction-purchaser was not the representative of the decree-holder, and a similar view would appear to have been taken in *Mammod* v. *Locke*(1) which, however, was not a case under section 310-A. It was also probably on that ground that it was held in *Chinnammal* v. *Athiratha Iyengar*(2), without assigning reasons, that no appeal lay under the circumstances of the present case. The decision in *Murlidhar* v. *Anandrao*(3) that there is only a restricted right of appeal under section 310-A proceeds on the authority of *Bashir-ud-din* v. *Jhori Singh*(4) and *Mammod* v. *Locke*(1) and therefore may possibly also be explained as proceeding also on this ground. It has now been settled by a recent decision of this Court that the auction-purchaser is the representative of the decree-holder for the purposes of section 244 (*Sandhu Taraganar* v. *Hussain Sahib*(5) following *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*(6), *Isan Chunder Sirkar* v. *Beni Madhub Sirkar*(7) and *Kasinatha Ayyar* v. *Uthumansa Rowthan*(8)).

We have, therefore, a question in execution arising between the appellant who claims to be the representative of the judgment-debtor, and the auction-purchaser who is the representative of the decree-holder and accordingly an appeal lay to the District Judge, and he should have considered whether the District Munsif was right in refusing to allow the transferee after the Court sale to come in under section 310-A as representative of the judgment-debtor. In our opinion the District Munsif was clearly wrong. The decision in *Hazari Ram* v. *Bodai Ram*(9) on which the District Munsif relied is opposed to *Erode Manikkoth Krishnan Nair* v. *Puttiedeth Chembakkoseri Krishnan Nair*(10), and was dissented from in *Appaya Shetti* v. *Kunhali Beari*(11); it is also opposed to the recent decision of the Bombay High Court on revision in *Mulchund Dagadu* v. *Govind Gopal*(12).

We must, therefore, allow the appeal and remand the case to the District Munsif to dispose of according to law.

Costs throughout will abide and follow the event.

(1) I.L.R., 20 Mad., 487.
(2) 10 M.L.J., 228.
(3) I.L.R., 25 Bom., 418.
(4) I.L.R., 19 All., 140.
(5) I.L.R., 28 Mad., 87.
(6) I.L.R., 19 Calc., 683.
(7) I.L.R., 24 Calc., 62.
(8) I.L.R., 25 Mad., 529.
(9) 1 C.W.N., 279.
(10) I.L.R., 26 Mad., 365.
(11) I.L.R., 30 Mad., 214.
(12) I.L.R., 30 Bom., 577.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. August 2, 7, 8, 21. September 9.

NATESA GRAMANI (DEFENDANT), APPELLANT IN SECOND APPEAL No. 868 OF 1906,

v.

VENKATARAMA REDDI, MINOR, BY HIS MOTHER AND GUARDIAN DHANALAKSHMI AMMAL (PLAINTIFF), RESPONDENT IN THE ABOVE.

VENKATARAMA REDDI (PLAINTIFF), APPELLANT IN SECOND APPEAL No. 964,

v.

KRISHNAPPA GRAMANI *alias* GOPALAKRISHNA GRAMANI (DEFENDANT), RESPONDENT IN THE ABOVE.*

Rent Recovery Act (Madras) Act VII of 1865, *ss.* 4, 11—Res judicata—*Contract to pay tax on improvements legal—Previous decision in summary suit binding in subsequent suits—Poramboke, water in—Water in poramboke lands not Sircar water—Appeal, powers of Court in—Appellate Court may by consent order trial on issues not raised in appeal.*

Water in poramboke lands belonging to mirasidars cannot be said to be Sircar water and taxed as such.

The effect of an appeal is to reopen the decree of the lower Court and it is competent to the Appellate Court on the agreement of parties to remand the case for trial on issues not raised in the memorandum of appeal.

The decision of a Revenue Court as to the propriety of a particular condition in a patta, when such decision does not proceed on any considerations peculiar to the particular fasli, is *res judicata* between the parties in subsequent suits in the same Courts.

Venkatachalapati v. *Krishna*, (I.L.R., 13 Mad., 287), referred to.

Section 11 of the Madras Rent Recovery Act contemplates rents being fixed by contract and it is only in the absence of contracts express or implied that resort is to be had to the methods of fixing rent specified in clauses 2 and 3 of the section. There is nothing in clause 4 to make a contract illegal which would have the effect of giving the landlord a share in the benefit of the tenants improvements. A *custom* to this effect may be opposed to the proviso to clause 4, but a contract is expressly authorised by the section and is not opposed to anything in the proviso.

Gopalasawmy Chetti v. *Fisher*, (I.L.R., 28 Mad., 328), referred to.

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* Second Appeals Nos. 868, 964 to 981 and 983 to 993 of 1906, presented against the decrees of V. Venugopaul Chetty, Esq., District Judge of Chingleput in Appeal Suits Nos. 146, 143 to 161, 162 to 171 and 173 of 1905, presented against the decision of C. G. Mackay, Esq., Head Assistant Collector of Chingleput Division, in Summary Suits Nos. 141, 73, 93, etc.

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NATESA GRAMANI v. VENKATARAMA REDDI.

SUMMARY suits under section 9 of the Rent Recovery Act for the enforcement of patta.

The facts are sufficiently set out in the judgment.

T. Rangachariar for *C. Pattabhirama Ayyangar* for appellant in Appeal Suit No. 868 of 1906.

Sir *V. Bhashyam Ayyangar* and *T. V. Seshagiri Ayyar* for respondent in the above.

Sir *V. Bhashyam Ayyangar* and *T. V. Seshagiri Ayyar* for appellant in Second Appeal No. 964 of 1906.

T. Ranga Chariar for respondent in the above.

JUDGMENT.—These are suits by a zamindar under the Rent Recovery Act to enforce the acceptance of pattas. The lower Courts have modified the pattas tendered in certain respects and the zamindar appeals. The pattas tendered follow generally the terms of a razinamah (exhibit F) by which certain suits brought by the zamindar to enforce acceptance of pattas in 1899 were compromised, and it is not disputed that from the date of the razinamah until fasli 1314 in respect of which the present suits are brought pattas and muchilikas have been exchanged in accordance with the terms of exhibit F, not only in the case of tenants who were parties to these suits, but in the case of other respondents as well. In their written statement the defendants make various objections to the pattas tendered and must be taken as admitting the propriety of the terms not objected to. One of the admitted terms is that wet lands on which second crop is raised with Sircar water are to pay half the first crop rate. Differences have arisen between the zamindar and the tenants as to whether second crop raised with water from certain ponds or madugus in the poramboke or unassessed lands of the village can be said to be irrigated with Sircar water. The main source of irrigation for the village is a tank, the bund of which is kept in repair by the zamindar and no question is raised as to the zamindar's right to wet rates on crops raised with water from this source, but with regard to the water in the madugus it is contended for the tenants that the poramboke in which they are situated is not the property of the zamindar but of the mirasidars and that water from such a source cannot be said to be Sircar water within the meaning of the stipulated rule. Both the Revenue Courts before which these suits came successively, and the District Court on appeal have found that in this village of the Chingleput district poramboke

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NATESA GRAMANI v. VENKATA-RAMA REDDI.

or unassessed lands are generally the property of the mirasidars, that these lands in which these madugus are situated must accordingly be taken to belong to the mirasidars, and that water taken from such madugus is not Sircar water. Very little evidence was tendered on either side. The zamindar called the karnam who said that the porambokes were the property of the zamindar, but did not speak to any act done in assertion of his ownership. The defendants on the other hand relied on a judgment of the District Munsif of Chingleput in Original Suits Nos. 468 to 473 of 1895, suits between the zamindar and some of the mirasidars to recover possession of certain porambokes in the village, in which it was held that the waste lands in this village are the property of the mirasidars. In this judgment reliance is placed on a number of exhibits showing that the mirasidars of this village had successfully asserted their right of ownership in the waste lands of the village during a long series of years. We think this judgment was evidence against the zamindar in the present suits under section 13 of the Indian Evidence Act, and we are not prepared to interfere with the finding of fact at which all the lower Courts have arrived as to the ownership of the poramboke or waste lands in this village. With regard to *Sivantha Naicken* v. *Nattu Ranga Chari*(1) we think the decision proceeded on the fact proved in evidence as to the particular village, and does not lay down as a matter of law that poramboke lands in villages such as this in the Chingleput district must necessarily be held to be the property of the zamindar. Even if the presumption be in favour of the zamindar, we think there was sufficient evidence to justify the lower Courts in holding it rebutted. If the porambokes belong to the mirasidars, we cannot see how the water in these madugus can be said to be Sircar water. The water in the big tank which the zamindar is required by custom to keep in repair stands on a different footing, and we must not be taken as suggesting any doubt as to its coming within the description of Sircar water for the purposes of these pattas. With regard to this part of the case we must refuse to interfere with the explanation directed to be inserted in the pattas to the effect that water from these madugus is not Sircar water within the meaning of the patta. The plaintiff's appeal therefore fails on this point.

(1) I.L.R., 26 Mad., 371.

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There are, however, two further points raised in these appeals. Paragraph 6 of exhibit F provided that a theerva of Rs. 7 should be payable in cocoanut gardens where theerva had hitherto been less than 2 pagodas, and the existing theerva in cocoanut gardens having a higher theerva; and paragraph 10 provided for a theerva of one anna per palmyra tree on nunja and punja lands other than certain specified lands. In the present suits the defendants pleaded in paragraph 11 of their written statement as to the first of these points that the plaintiff had not specified which topes were chargeable at the rate of 2 pagodas and which at the rate of 5 pagodas, and had made an arbitrary demand which was not valid. This plea does not directly deny that theerva was payable at the rate of from 2 to 5 pagodas on cocoanut topes, but rather complains of the way in which these rates were imposed.

As to the tax on palmyra trees the defendants pleaded in paragraph 12 that it was not proper to charge a theerva of one anna on palmyra trees growing in punja and nunja lands. The Acting Head Assistant Collector did not frame any issue as to the rates on cocoanut topes, and found against the defendants as to the tax on palmyra trees. The defendants in only seven of the suits appealed against his decree in Appeal Suits Nos. 143 to 148 of 1905 on the file of the District Judge, Chingleput, while the plaintiff filed Appeal Suits Nos. 150 to 173. When these appeals came on before the District Judge, all parties being represented except the respondents in Appeal Suits Nos. 160 and 165, the District Judge, at the written request of the representatives of the parties who appeared, remanded the cases to the lower Court for trial on issues specified by such representatives. It is now objected on behalf of the zamindar that it was not competent to the District Judge to go behind the decrees of the Acting Head Assistant Collector as to matters in which no appeals had been filed by the tenants. The effect of the zamindar's appeals was to reopen the decrees of the Head Assistant Collector settling the terms of the pattas, and it was we think competent to the parties to agree that the case should be remanded for the trial of fresh issues even on points which were not raised in the zamindar's grounds of appeal. This objection therefore in our opinion fails.

The fresh issues which are the subject of the present appeal are the fourth and fifth, which relate to the rates payable for cocoanut gardens, and the rate of one anna on palmyra trees. The matters

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substantially dealt with in these issues were covered by the razinamah judgment (exhibit J) which sanctioned the exchange of pattas and muchilikas in the terms of exhibit F, and it is now contended for the appellant that as between the zamindar and the tenants who were parties to Summary Suits Nos. 2, etc., of 1899 in the Court of the Sub-Collector of Chingleput these issues are *res judicata*. Although the pleadings in these suits have not been put in in evidence, it appears from exhibit J that the parties were at issue as to the conditions to be inserted in the pattas, and that they compromised the suits on the terms that the conditions to be inserted in the pattas should be those specified in exhibit F. Although the pattas decreed were only for fasli 1308, we think that it must be held to have been decided that the conditions in exhibit F were such as were proper to be inserted in pattas and muchilikas between the parties, so long as the existing state of things should continue and until something should happen such as a subsequent contract to render them inapplicable. Not only is there nothing in exhibits F and J to show that the conditions in exhibit F were applicable only to the particular fasli, but the provision in clause 8 that in cocoanut gardens planted thereafter garden rates should not be payable until the trees begin to yield fruit shows conclusively that the parties were not agreeing on any special conditions applicable to the particular fasli, but generally as to the conditions proper to be inserted in pattas and muchilikas between the parties.

The decision of a Revenue Court as to the propriety of a particular condition in a patta, when such decision does not proceed on any considerations peculiar to the particular fasli is we think *res judicata* between the parties in subsequent suits in the same Courts just as much as the question whether the relation of landlord and tenants exists between the parties—a question which was held to be *res judicata* in *Venkatachalapati* v. *Krishna*(1). Subsequent events may arise to determine the landlord's title or render the condition in a patta inapplicable, but otherwise the title of the landlord and the propriety of the condition must alike be held to be *res judicata*. As remarked by the Court in that case it would be intolerable if a defendant who has been declared by a competent Court to be the tenant of the plaintiff

(1) I.L.R., 13 Mad., 287.

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and as such bound to accept a patta and grant a muchilika were to be permitted to put his landlord year by year to the proof of his title. It would, we think, be equally intolerable if a landlord or a tenant were to be entitled year by year to question a condition in a patta, the propriety of which had been established in litigation between the parties. We must therefore hold that as regards tenants who were parties to Summary Suits Nos. 2, etc., of 1899 and their representatives the questions raised in the fourth and fifth of the remanded issues are *res judicata*, and we must allow the zamindar's appeals on these points and direct the pattas to be so amended as to bring them into conformity with exhibit F. This decision admittedly governs Second Appeals Nos. 966 to 969, 972, 974, 976, 978, 983, 984, 989, 991 and 992 of 1906. In these Second Appeals the parties will bear their own costs throughout.

We have still to deal with the fourth and fifth issues in so far as the other respondents are concerned. With regard to the fourth issue, as already pointed out, the claim for garden rates in respect of cocoanut topes is denied in a very halting manner in the defendant's written statement. In the issue the correctness of the rates claimed for existing cocoanut gardens is admitted, and the question is confined to the rates to be imposed on new cocoanut gardens raised, which according to paragraph 8 of exhibit F were to be Rs. 7 as soon as the trees became fruit yielding. In the patta decreed by the lower Appellate Court garden rates at from Rs. 7 to Rs. 17–8–0 are imposed on cocoanut topes which have attained the fruit-bearing stage, but otherwise the landlord is prohibited from levying more than the existing punja rate for cocoanuts, fruit trees, or any kind of garden crops.

It is not apparent why higher rates should be payable in respect of cocoanut trees which began to bear fruit before the date of these suits, and lower rate in respect of cocoanut trees which do not begin to bear fruit until later, as the institution of these suits does not constitute a fresh departure. The admission of the claim for higher rates in respect of cocoanuts which began to bear fruit before the date of the suits goes some way to show that a similar demand in respect of cocoanut trees which begin to bear fruit subsequently is *primâ facie* legal, but this point does not seem to have been considered by the lower Courts, who have disposed of the question on abstract grounds and practically without

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reference to the rates previously payable on this estate. The Sub-Collector found that the claim as regards new trees would deprive the tenants of the benefit of their improvements, and held following the decision in *Fischer* v. *Kamakshi Pillai*(1) that a custom having that effect would be illegal. He found also that no contract was proved, but rejected the evidence of previous muchilikas tendered by the plaintiff to prove the existence of such a contract. The District Judge held that the evidence was wrongly excluded, but was of opinion that it did not matter. It is not clear from his judgment why he held that such evidence would be immaterial. Before us it has been argued that a contract which would have the effect of depriving the tenant of any of the benefit of his improvements would be bad as opposed to the provisions of section 11 of the Rent Recovery Act. This contention proceeds on a misunderstanding of section 11 and is opposed to the authority of decided cases. The section contemplates rents being fixed by contract, and it is only in the absence of contract express or implied that resort is to be had to the methods of fixing rent specified in clauses 2 and 3. Clause 4 which also deals with waste unoccupied lands reserves the landlord's right to contract on any terms he likes for the letting of such lands in the absence of any special rights held by any class such as the mirasidars here in such lands. There is nothing in the proviso to clause 4 to make a contract illegal which would have the effect of giving the landlord a share in the benefit of the tenants' improvements. In the absence of contract or survey rates the landlord is entitled under clause 3 to revert to the waram system, an incident of which is that the landlord necessarily shares the benefit of the tenants' improvements. There is no express prohibition of contracts of this kind which merely perpetuate to a greater or less extent a feature of the old waram system. In *Fischer* v. *Kamakshi Pillai*(1) it was held in a case where money rates had been substituted for the waram system that the Court would not enforce a custom the effect of which would be to tax the tenants' improvements. But while a custom to this effect may be held opposed to the proviso to clause 4, a contract is expressly authorized by the section and is not opposed to anything in the proviso—see *Gopalasami Chettiar* v. *Fischer*(2) and also the judgment of Subrahmania Ayyar, J., in

(1) I.L.R., 21 Mad., 136. (2) I.L.R., 28 Mad., 328.

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Arumugam Chetti v. *Raja Jagaveera Rama Venkateswara Ettappa*(1) a case which has not yet been finally disposed of in this Court. Owing to the wrongful rejection of evidence of contract these appeals must go back to the District Judge for a finding on fresh evidence on the fourth issue.

The fifth issue relates to the claim of a theerva of one anna on palmyra trees standing on nunja and punja lands with certain exception. This was the claim put forward in the patta following exhibit F. The defendants pleaded that if there are fruit yielding palmyra trees on the nunja and punja lands on which theerva is payable it is not proper to demand theerva on these palmyra trees at one anna per tree. The Acting Head Assistant Collector framed an issue whether an additional demand for fruit bearing palmyras is justifiable, and whether he (the zamindar) is entitled to raise the question now. At the trial he found that the defendants had failed to prove that a double charge had been made in a single instance, and considered it unnecessary to record a finding. When the Appellate Court remanded the case for findings on additional issues, the fifth issue it sent down at the request of the parties was in the following terms :—

"Whether the palmyra trees in the tenants' holding, according to the custom of the estate, are classed as poramboke masul trees and, as such, are chargeable separately for each fruit bearing tree, or (which we take it means 'and if so') whether the tenant is entitled to claim reduction of rent for so much of the land as is covered by the palmyra trees and, if so, what is the amount."

The suggestion apparently is that the palmyra trees in the tenants' holding are to be regarded as excluded from the ordinary assessment and so liable to a separate assessment. The course taken by the Court to which the issue was remanded of deciding it without taking fresh evidence on evidence given at the first trial was not satisfactory, although the statement of the karnam that he did not know if the land on which the palmyras stood was excluded from assessment or not certainly goes a long way to negative the suggestion. Further this issue does not satisfactorily cover the contentions which naturally arise in a suit of this nature and which have been raised before us, whether the one anna rate claimed in the plaint is payable either by lawful custom or by

(1) I.L.R., 28 Mad., 444.

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contract. As we have already said a contract to this effect would certainly be good, and payment of the rate over a long series of years would *primâ facie* be presumptive evidence of a contract. The Sub-Collector having excluded all evidence as to the rates payable before exhibit F proceeded to surmise that this rate was imposed for the first time in exhibit F. If evidence had been admitted, it might apparently have been established for the plaintiff that the rate was being paid so far back as 1867; see *Muttusamy Mudaly* v. *Sadagopa Gramany*(1), which we find on reference to the papers related to this estate, and in which 52 palmyras are said to be chargeable with Rs. 3-4-0, that is, one anna per tree. It will therefore be necessary to send the case back for a finding on the issue whether the special theerva on palmyra trees claimed in the patta tendered is lawfully payable.

With regard both to this and to the fourth issue Sir Bhashyam Ayyangar further contended that these respondents who though not parties to the suits which were compromised under exhibits J and F, after that compromise also accepted pattas in the terms of exhibit F must be held to have contracted to pay the stipulated rates not merely for the fasli but for all future faslis and that even if other considerations were absent the settlement of the dispute between the parties would be sufficient consideration. It will be open to the appellant to establish this contention, if he can, before the District Judge on the fresh evidence that is to be taken; at present owing to the course taken by the Court to which the fresh issues were remanded there are no sufficient materials before us to enable us to deal finally with it.

As regards the second appeals which have not been allowed we must call on the District Judge to submit findings on the fourth and fifth issues as modified. The findings should be submitted within two months from the date of the receipt of this order by the lower Court, and seven days will be allowed for filing objections.

The Memorandum of Objections in Second Appeal No. 969 of 1906 against the finding of the lower Appellate Court on the first and third issues must be dismissed with costs. As regards the first issue it is found that the bad state of repair of the tank has not affected the productiveness of the lands under it. As regards

(1) 4 M.H.C.R., 398.

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the third issue, the rates payable on the cocoanut gardens cannot be affected by reason of the death of the trees. The tenant should keep up a succession of trees, and it is always open to him to relinquish the land if it is no longer profitable.

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The appeal in Second Appeal No. 868 of 1906 on the same grounds follows and it is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Miller.

1906. December 21. 1907. January 8. September 18.

VAHAZULLAH SAHIB HAVING DIED, HIS SON AND HEIR MIR AZMATULLAH SAHIB (LEGAL REPRESENTATIVE OF THIRD DEFENDANT), APPELLANT,

v.

BOYAPATI NAGAYYA AND OTHERS (PLAINTIFF'S LEGAL REPRESENTATIVE AND DEFENDANTS NOS. 1, 2 AND 4), RESPONDENTS.*

Muhammadan Law—Gift—Gift by registered instrument not valid if unaccompanied by delivery of possession.

The Muhammadan Law is applicable to gifts between Muhammadans, even when effected by registered instrument, and such a gift will be invalid unless the requirements of Muhammadan Law as to possession are complied with.

Chaudhri Mehdi Hasan v. *Muhammad Hussan*, (L.R., 33 I.A., 68 at p. 75), followed.

Mogulsha v. *Mahamad Sahib*, (I.L.R., 11 Bom., 517), referred to.

Alabi Koya v. *Mussa Koya*, (I.L.R., 24 Mad., 513), not followed.

SUIT to recover the amount due on a hypothecation bond executed by first and second defendants in favour of plaintiff, by sale of the hypothecated properties and, personally, from defendants Nos. 1 and 2.

The properties hypothecated, originally belonged to one Mahomed Jaffir who made a gift of them to his wife Silar Bi in 1872. Silar Bi gave them to the fourth defendant and her deceased husband Sheik Imam by registered deed. The first and second

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* Second Appeal No. 742 of 1904, presented against the decree of M.R.Ry. I. L. Narayana Row Naidu, Subordinate Judge of Kistna at Masulipatam, in Appeal Suit No. 221 of 1903, presented against the decree of M.R.Ry. K. Sundaram Chetty, District Munsif of Beswada, in Original Suit No. 858 of 1901.

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defendants were the sons of Sheik Imam. Silar Bi was admitted to be living in the house, the subject-matter of the gift, till her death.

The third defendant claimed a portion of the hypothecated property under an assignment by the donor made subsequently to the date of the gift to the fourth defendant and her deceased husband.

The main point for decision was whether first and second defendants' father acquired a valid title by gift from Silar Bi.

Both the lower Courts held the gift by Silar Bi valid on the authority of *Alabi Koya* v. *Mussa Koya*(1).

The legal representatives of the deceased third defendant appealed to the High Court.

V. Ramesam for appellant.

K. Subrahmania Sastri for fifth respondent.

JUDGMENT.—This is a suit by the plaintiff for sale of the property mortgaged to him by the first and second defendants and is contested by the third defendant on the ground, among others, that the registered deed of gift (exhibit C), under which the property in question was conveyed to the father and mother of the first and second defendants, was bad according to Muhammadan Law, because the donor did not part with possession of the property comprised in the deed of gift, and that consequently subsequent alienations by the donor under which the third defendant claimed were good. Both the lower Courts have held the Muhammadan Law inapplicable to gifts by registered instrument on the authority of certain observations of Benson, J., in the case of *Alabi Koya* v. *Mussa Koya*(1). It was held by that learned Judge that section 16 of the Madras Civil Courts Act did not expressly make the Muhammadan Law applicable to gifts, that gifts of Muhammadans must be governed by justice, equity and good conscience, and that it was open to doubt whether the Muhammadan rule as to delivery of possession being necessary to validate the gift, was adapted to modern requirements, and whether the mode of transfer laid down as obligatory on Europeans and Hindus by section 123 of the Transfer of Property Act and adopted by the parties in that case, viz., by registered instrument attested by two witnesses and signed by the donor, ought not, in equity and good conscience, to be held as efficacious as delivery of possession in the case of Muhammadans.

(1) I.L.R., 24 Mad., 513.

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These observations were not necessary for the decision, as the learned Judge proceeded to hold that the requirements of Muhammadan Law as to delivery of possession had been sufficiently complied with in that case, nor were they concurred in by Mr. Justice Shephard who held that, assuming the Muhammadan Law to apply, the gift was good. On the other hand we have been referred to *Bava Saib* v. *Mahomed*(1), in which the Muhammadan Law was held applicable to gifts in this Presidency, a case which does not appear to have been cited in the case of *Alabi Koya* v. *Mussa Koya*(2). In that case the gift was made orally, but this fact cannot in our opinion make any difference, as if a gift is bad by Muhammadan Law for want of possession when made orally, there is nothing in the provisions of the Registration Act III of 1877 or the Transfer of Property Act IV of 1882 to render such gift valid when made by registered instrument. There are also earlier cases in which gifts between Muhammadans have been treated as governed by Muhammadan Law, viz., *Hussain* v. *Shaik Mira*(3), *Nabob Amiruddaula Muhammad Kakya Hussain Khan Bahadur Amirjung* v. *Nateri Srinivasa Charlu*(4). Under section 24 of the Bengal Civil Courts Act, 1871, the terms of which for the present purpose are substantially identical with those of section 16 of the Madras Civil Courts Act III of 1873, the Muhammadan Law has been applied by the Privy Council to gifts between Muhammadans —*vide Mahomed Buksh Khan* v. *Hosseini Bibi*(5); and in the North-West Provinces the same section has been expressly construed as rendering Muhammadan Law applicable to such gifts, see North-West Province High Court Reports, 1874, page 2, and *ibid.*, page 28, cited in the case of *Gobind Dayal* v. *Inayatullah*(6). In these two cases the Courts were unanimous that Muhammadan Law was applicable, but there was a difference of opinion as to the grounds on which it was applicable, the majority holding that in the circumstances it was applicable as a rule of justice, equity and good conscience, while the minority were of opinion that questions as to gifts between Muhammadans were covered by the express provisions as to questions regarding succession, inheritance, marriage or caste or any religious usage or institution. Lastly in Bombay it has been expressly held that gifts between Muhammadans

(1) I.L.R., 19 Mad., 343.
(2) I.L.R., 24 Mad., 513.
(3) I.L.R., 13 Mad., 46.
(4) 6 M.H.C.R., 356.
(5) I.L.R., 15 Calc., 684.
(6) I.L.R., 7 All., 775.

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by registered instrument are invalid unless the requirements of Muhammadan Law as to possession are complied with—*vide* *Mogulsha* v. *Mahamad Saheb*(1) and *Ismal* v. *Ranji Sambhaji*(2). We are therefore of opinion that Muhammadan Law is applicable to gifts between Muhammadans even when effected by registered instrument and that the lower Courts were wrong in deciding otherwise. It must, however, be borne in mind that the task of discovering and applying the rules of Muhammadan Law to the circumstances of this country is often one of great difficulty as pointed out by Garth, C.J., in the case of *Mullick Abdool Guffoor* v. *Muleka*(3), and that in choosing between conflicting authorities the principles of justice, equity and good conscience must be regarded—*vide* *Sheikh Muhummad Mumtaz Ahmad* v. *Zubaida Jan*(4) and *Bibi Khaver Sultan* v. *Bibi Rukha Sultan*(5). Assuming Muhammadan Law to be applicable, as laid down in *Chaudhri Mehdi Hasan* v. *Muhammad Hasan*(6), it is incumbent on a party claiming under a gift to show very clearly that the requirements of Muhammadan Law have been met, and consequently, if he relies on a gift without consideration, to show that there has been delivery of the thing given, so far as it is capable of delivery. The appellant has also contended on the authority of *Bava Saib* v. *Mahomed*(7) that the fact of the donor of the house continuing to live in it would invalidate the gift, while on the other side we have been referred to the cases of *Shaik Ibhram* v. *Shaik Suleman and others*(8), *Humera Bibi* v. *Najm-un-nissa Bibi*(9), to which may be added the case of *Bibi Khaver Sultan* v. *Bibi Rukha Sultan*(5).

It is however unnecessary to discuss this point at the present stage, as it is not clear that it arises. Muhammadan Law being applicable, a finding is necessary as to whether the defendants Nos. 1 and 2 have shown that the gift under which they claim has satisfied the requirements of that law as to transmutation of possession and otherwise. Apart from the question of the continuing residence of the donor in the house, there appears to be some conflict of evidence on the point, and we direct the District Judge

(1) I.L.R., 11 Bom., 517.
(2) I.L.R., 23 Bom., 682.
(3) I.L.R., 10 Calc., 1112 at p. 1123.
(4) L.R., 16 I.A., 205 at p. 215.
(5) 6 Bom., L.R., 983.
(6) L.R., 33 I.A., 68 at p. 75.
(7) I.L.R., 19 Mad., 343.
(8) I.L.R., 9 Bom., 146.
(9) I.L.R., 28 All., 147.

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to return a distinct finding on this issue within six weeks. Seven days will be allowed for filing objections.

In compliance with the above order the District Judge submitted the following

FINDING.—In this case certain property was mortgaged by first and second defendants and the question for determination is whether they had any right to the property which would entitle them to mortgage it. Their claim to the property is a deed of gift executed by one Silar Bibi in favour of their father, and I am now asked for a finding as to whether the defendants Nos. 1 and 2 have shown that this gift has satisfied the requirements of Muhammadan Law as to transmutation of possession and otherwise.

It is admitted that after the execution of the deed of gift to Sheik Imam (the father of defendants Nos. 1 and 2). Silar Bibi continued to live in the house. In order to make a gift valid under Muhammadan Law, it is essential that the donor should divest himself absolutely of all rights in the property. I am unable to see how there can be said to have been absolute divestment of rights in the present instance. Sheik Imam who is described as Silar Bi's "foster son was no real relation to her." After the deed of gift was executed Silar Bi continued to share in the possession of the house. After Sheik Imam died she exercised rights of ownership over it.

I find the issue in the negative.

The second appeal coming on for final hearing after the receipt of the above findings of the lower Court, this Court delivered the following

JUDGMENT.—We accept the finding and modify the decree of the lower Courts by dismissing the suit as against the third defendant with costs throughout and excluding from the decree the house and site marked B in the plan attached to the written statement of the third defendant.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Wallis.

1907. April 23, 24. August 13.

VELAYUTHA CHETTY (PLAINTIFF No. 2), APPELLANT,

v.

GOVINDASAWMI NAIKEN (DEFENDANT No. 4), RESPONDENT.*

Transfer of Property Act, Act IV of 1882, s. 55—Vendor, lien of unpaid—Lien is not possessory but only a charge—Adverse possession.

The lien of the unpaid vendor of land under section 55 of the Transfer of Property Act is non-possessory. He has only a right to retain the title deeds and to a charge for the unpaid purchase money, but he cannot retain possession of the property sold against the vendee.

SUIT to recover two items of land from defendants Nos. 1 to 4.

Item (1) was sold by the fourth defendant to the first plaintiff on 27th January 1886. Item (2) was sold to the first plaintiff by one *A* on behalf of the fourth defendant on 19th February 1886 and the sale deed was attested by fourth defendant. The suit was instituted on 19th March 1901. The plaintiff's case was, that he leased the lands to defendants Nos. 1 to 3 through the fourth defendant and continued to receive rent to within three years of suit. The fourth defendant contended that no consideration was paid to him for either of the sales and he therefore continued in possession. The defendants Nos. 1 to 3 supported the fourth defendant, and all the defendants contended that the plaintiff's suit was barred by limitation.

The District Munsif found on the evidence that the consideration had been paid for the sale by the plaintiff and that the possession by the fourth defendant after the sale was not adverse but only permissive and as agent for plaintiff. He accordingly decreed for the plaintiff. On appeal the District Judge reversed this decision and dismissed the suit.

The second plaintiff appealed to the High Court.

T. Subrahmania Ayyar for appellants.

T. V. Gopalasami Mudaliar for respondent.

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* Second Appeal No. 1162 of 1904, presented against the decree of Venor A. Brodie, Esq., District Judge of Coimbatore, in Appeal Suit No. 175 of 1902, presented against the decree of M.R.Ry. T. T. Rungachariar, District Munsif of Erode, in Original Suit No. 102 of 1901.

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VELAYUTHA CHETTY *v.* GOVINDA-SAWMI NAIKEN.

JUDGMENT.—This is an appeal from a decree of the lower Appellate Court reversing a decree of the District Munsif who gave judgment for the appellant in a suit instituted by him to recover possession of certain lands from the respondent, the fourth defendant and others. The suit lands were admittedly conveyed to the plaintiff by exhibit A, dated the 19th February 1886, and exhibit B, dated the 27th January 1886, of which the first was witnessed and the second executed by the respondent, the fourth defendant. The District Judge differing from the District Munsif has found that the payment of the purchase money is not proved, and he has also found that the respondent remained in possession, and has held on the authority of *Anand Coomari* v. *Ali Jamin*(1) that where an unpaid vendor remains in possession, such possession is *primâ facie* adverse to the vendee, and that, consequently, the present suit is barred by limitation. Assuming that the onus of showing that the possession of the unpaid vendor was not adverse rests upon the vendee, it is, in our opinion, sufficiently discharged by the extract from the village accounts, exhibit G, which shows that after the conveyance the vendors in whose name the puttah formerly stood had a puttah issued in the name of the vendee instead. We must therefore hold, on the uncontradicted evidence of exhibit G, that the possession of the respondent was not adverse and that the suit is not barred by limitation.

It has been further contended that the vendee not having paid the purchase money the vendor, by virtue of his lien for unpaid purchase money, is entitled to retain possession. This however is opposed to the provisions of the Transfer of Property Act and the English Law on which it is based. Under section 55 (1) (*f*) the vendee is entitled to possession, while the unpaid vendor is entitled to retain the title deeds under section 55 (3) and is entitled to a charge for the unpaid purchase money under section 55 (4) (*b*). In England also the vendor's lien for unpaid purchase money is non-possessory, Fisher on 'Mortgage,' paragraph 505. The appeal must be allowed, the decree of the lower Appellate Court set aside and the decree of the District Munsif restored with costs in this and the lower Appellate Court.

(1) I.L.R., 11 Calc., 229.

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APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Miller.

1907. July 19, 23.

HALIMA BEE (PLAINTIFF), APPELLANT,

v.

ROSHAN BEE AND OTHERS (DEFENDANTS), RESPONDENTS.*

Contribution—Co-heir not liable to contribute towards expenses incurred by other heirs in litigation in respect of common property.

A co-heir is not liable, either under an implied contract or on grounds of equity to contribute towards the expenses of litigation *bonâ fide* carried on by other heirs in respect of the common property.

Dakshina Mohan Roy v. *Saroda Mohan Roy*, (I.L.R., 21 Calc., 142), referred to.

SUIT for partition.

The parties were Muhammadans. The plaintiff had two sons, Bapu and Gulam Hussain, who lived together and enjoyed their property in common. Gulam Hussain died on the 1st September 1898 and Bapu continued in possession of all the property until his death in October 1900. Bapu had two wives. One predeceased him, leaving four daughters, namely, the third, fourth, fifth and sixth defendants. Vazir, the second defendant, was his other wife and the seventh and eighth defendants were her children. The first defendant was Gulam Hussain's widow. The third defendant married one Abdul Aziz, whose father Abdul Ganni was the ninth defendant.

Defendants Nos. 1 and 2 pleaded, *inter alia*, that to defray the expenses of litigation in respect of the common properties, monies were borrowed from the ninth defendant on a mortgage of the properties and contended that the sums so borrowed should be paid out of the common property.

The lower Court found that the monies were borrowed for litigation expenses and other purposes in connection with the common properties and held that the plaintiff's share ought to bear its due proportion of the burden.

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* Appeal No. 150 of 1904, presented against the decree of R. D. Broadfoot, Esq., District Judge of Chingleput, in Pauper Original Suit No. 17 of 1903.

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Plaintiff appealed.

V. Viswanatha Sastri for appellant.

The Hon. Mr. *P. S. Sivaswami Ayyar* for respondent.

JUDGMENT.—The appellant in this case is the mother of the deceased Bapu Sahib. The lower Court has upheld a mortgage in favour of the ninth defendant by two of the other wives of Bapu Sahib, on the ground that the money secured by it was raised for the purpose of carrying on the defence of a testamentary suit in the High Court in which a will was propounded which purported to have been executed by the deceased.

On behalf of the representatives of the ninth defendant, Mr. Sivaswami Ayyar supports the mortgage on the ground that a co-heir ought to bear his proportion of the expenses incurred for the preservation of the common property. Though he cited many authorities in support of this contention it must be held that *Abdul Wahid Khan* v. *Shaluka Bibi*(1), to which also he drew our attention is directly in point, and negatives his contention. The case of *Dakhina Mohan Roy* v. *Saroda Mohan Roy*(2), on which Mr. Sivaswami Ayyar relied, was brought to the notice of their Lordships in the former case; they nevertheless held that a party occupying a position similar to that of the present plaintiff was not liable either under an implied contract or on grounds of equity to share the expenses of litigation *bonâ fide* carried on in respect of the common property. The appeal is therefore allowed and the plaintiff is declared entitled to recover her share free from any liability in respect of the mortgage of the ninth defendant. The decree of the lower Court will be modified accordingly. In the circumstances each party will bear his own costs of this appeal.

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(1) I.L.R., 21 Calc., 496. (2) I.L.R., 21 Calc., 142.

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APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Sankaran Nair.

1904.
August 26.

KITTU HEGADTHI (FIRST DEFENDANT), APPELLANT,

v.

CHANNAMMA SHETTATHI (PLAINTIFF), RESPONDENT.*

Landlord and tenant—South Canara, tenant in—No presumption that tenancy is chalgeni or mulgeni—Immemorial possession on uniform rent, presumptive evidence of mulgeni.

There is no presumption in South Canara that a tenancy is either *chalgeni* or *mulgeni.*

Immemorial possession on a uniform rent will raise a presumption in favour of mulgeni tenure and the burden will be on the other party to prove that the tenant was holding on chalgeni tenure.

Boggu Shetti v. *Raghurama Naik*, (Second Appeals Nos. 187 and 192 of 1879), referred to.

SUIT to recover land.

The plaintiff alleged that the first and second defendants were chalgeni tenants and brought this suit to eject them and recover rent for the year Vikari.

The first defendant pleaded *inter alia* that he was not a chalgeni tenant and claimed a permanent right of occupancy.

The first issue was whether the defendants Nos. 1 and 2 were chalgeni tenants or whether they had occupancy rights.

On this issue the Munsif in his judgment observed as follows :—

"In the absence of evidence to prove a permanent tenancy, it should be presumed to be a yearly or chalgeni tenancy. But continued possession for a long time without any evidence as to the tenancy being either chalgeni or vaidegeni is *primâ facie* proof of permanent tenancy. I consider that long continued possession

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* Second Appeal No. 1470 of 1902, presented against the decree of J. W. F. Dumergue, Esq., District Judge of South Canara, in Appeal Suit No. 135 of 1901, presented against the decree of M.R.Ry. M. Deva Row, District Munsif, Udipi, in Original Suit No. 802 of 1900.

Foot-note.—By order of Mr. Justice Wallis, the above case is reported together with the following judgment : —

JUDGMENT.—In Second Appeal No. 192 of 1879 we think the burthen of proof in this case was rightly said by the Sub-Judge to lie upon the plaintiff. To try the question by the usual tests, if neither side gave any evidence, plaintiff

on a uniform rental should be considered to cast on plaintiff the burden of proving her right to eject, on failure to do which, defendants' possession should not be disturbed. Such long possession may be construed to confer a sort of occupancy right."

KITTU HEGADTHI v. CHANNAMMA SHETTATHI.

The plaintiff's suit was dismissed on the ground that she had not proved her plea that the defendants were chalgeni tenants.

On appeal the District Judge reversed this judgment and decreed plaintiff's claim. Regarding the first issue the District Judge observed as follows:—

"The District Munsif was clearly wrong in holding that the burden lay on the plaintiff of proving that the first and second defendants are merely chalgeni tenants (*Secretary of State for India* v. *Luchmeswar Singh*(1)) and (*Rangasami Reddi* v. *Gnana Sammantha Pandara Sannadhi*(2)). The burden of proving a right of permanent occupancy lay on the first and second defendants, and the mere fact that they and their predecessors have had possession of the land for 80 years subject to the payment of rent is insufficient to establish their case. The existence of the tenancy having been shown at a rent paid down to the commencement of the suit, length of enjoyment coupled with such payment of rent cannot give greater force to the tenants' right than it originally possessed (*Thakur Rohan Singh* v. *Thakur Surat Singh*(3)). So far as this point is concerned, therefore, the first and second defendants are liable to ejectment."

First defendant appealed to the High Court.

A. Srinivasa Poi for appellant.

K. Naraina Rau for respondent.

JUDGMENT.—It has been held by this Court in Second Appeals Nos. 187 and 192 of 1879 that, in South Canara, there is no

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could not recover, because there is no admission that the tenancy existed originally as a chalgeni tenancy and was subsequently converted into a tenancy of a permanent character. Nor if the allegation of a chalgeni tenancy were struck out could plaintiff recover. Nor in such a case is there any presumption in favour of what is affirmed by plaintiff.

There is an instructive case in the Digest Lib. XXII, title III, paragraph 25, fr. 1. Plaintiff claimed certain money from defendant who admitted it had been paid to him, but said it was so paid in discharge of a debt. Parkes held that it was for the plaintiff to show that the money paid was not a debt. Because all that was known was that the money had been paid, and the presumption in such case was in favour of its having been paid because it was owed. In the present case it is true there is no presumption in favour of the permanency of the tenancy,

(1) I.L.R., 16 Calc., 223. (2) I.L.R., 22 Mad., 264.

(3) I.L.R., 11 Calc., 318.

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KITTU HEGADTHI v. CHANNAMMA SHETTATHI.

presumption that a tenancy is either chalgeni or mulgeni. In this case the tenants have proved immemorial possession on a uniform rent, and this fact raises a presumption in favour of mulgeni. It was therefore on the plaintiff to prove that the defendants were only chalgeni tenants by proving that such was the origin of the tenancy, or that subsequent dealings are consistent only with that tenure. There is no such evidence in the case. We must therefore set aside the decree of the District Judge and restore that of the Munsif with costs in this and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar.

1907.
March 13, 18.

SAMINATHA AIYAR (DEFENDANT), PETITIONER,

v.

MUTHUSAMI PILLAI (PLAINTIFF), RESPONDENT.*

Contract Act—Act IX of 1872, *s.* 23—*Promise to pay money to procure resignation of public office not enforceable.*

An undertaking to pay money to a public servant, to induce him to retire and thus make way for the appointment of the promisor, is virtually a trafficking with reference to an office and is void under section 23 of the Contract Act.

Parsons v. *Thompson*, (I.H.Bl., 322, 2 R.R., 773), followed in principle.

CLAIM on a promissory note executed by defendant in favour of the plaintiff's assignor for Rs. 25.

The further facts necessary for the purposes of the report appear in the judgment.

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but there is no presumption either way, because although the chalgeni form of tenure is more common than the other, either kind of tenancy is quite ordinary.

Defendant's possession is consistent with the larger right which he asserts. It is for plaintiff who attributes a smaller right to defendant to prove his allegation.

With regard to Second Appeal No. 187, the plaintiff was clearly not entitled to 12 years' rent. The appeal should be allowed in this respect and the decree of the Sub-Judge modified by allowing only the rent of the years Bhava and Yuva, 1874–75 and 1875–76.

The defendant will have his costs of the appeal.

* Civil Revision Petition No. 480 of 1906, presented under section 25 of Act IX of 1887 praying the High Court to revise the decree of M.R.Ry. S. Ramaswami Aiyar, District Munsif of Chidambaram, in Small Cause Suit No. 381 of 1906.

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SAMINATHA AIYAR v. MUTHUSAMI PILLAI.

The Munsif decreed for plaintiff. Defendant filed civil revision petition under section 25 of Act IX of 1887.

S. Muthiah Mudaliar for petitioner.

T. Rangaramanuja Chariar for respondent.

JUDGMENT.—The point for determination in this case is whether the promissory note sued on is enforceable.

The note was executed for Rs. 25 stated to be the balance due under a previous promissory note between the same parties. The previous note is not produced, but the consideration therefor sufficiently appears from the present note itself. This describes it as balance of money promised in respect of "Kanakku Isum Marudal" which translated literally is "Karnam individual transfer or change." The payee was, at the time the first promissory note was executed, Government Karnam of the village on leave. The maker was acting for him in the office. Taking the words quoted above in the light of the said circumstances, it is clear to my mind that the money was promised in consideration of the permanent Karnam doing what lay in his power to secure the appointment permanently to the defendant. If this view is correct the agreement, unquestionably, was unlawful as shown by illustration F to section 23 of the Contract Act. In the language of the English law, the substance of which the illustration embodies, the agreement was an office brocage agreement invalid as opposed to public policy.

Mr. Rangaramanuja Chariar on behalf of the plaintiff urged that the view taken by me above involves an undue straining of the language of the note referred to above, and that the real consideration was but a promise on the part of the permanent Karnam to resign the office in order to facilitate the defendant getting appointed to it, and that the resignation having taken place the promise was good. Even so the conclusion must be the same. No doubt public servants in the position occupied by the payee here are ordinarily at liberty to resign their offices when they wish to do so. But I am unable to agree with the argument that a promise to pay money in order to procure resignation with a view to the promisor securing the appointment is an enforceable promise. The principle of the decision in *Parsons* v. *Thompson*(1) cited for the defendant is applicable here. In that case, *A* being possessed of an office in a dockyard, *B*, in order to induce

(1) I.H.Bl., 322, 2 R.R., 773.

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SAMINATHA AIYAR v. MUTHUSAMI PILLAI.

him to procure himself to be superannuated and retire on the usual pension, agreed (without the knowledge of the Navy Board to whom the appointment belonged) in case *B* should succeed him, to allow him a certain annual share of the profits of the office. *B* was appointed but did not perform the agreement. It was held that *A* could maintain no action on the agreement. There is, no doubt, some difference between the facts of that case and of the present, *e.g.*, there is no question here of pension nor an agreement to share in the profits of the office. But it seems to me that the promise which is one to pay money as consideration for the retirement in the circumstances here of a public servant is in essence not different from the agreement in the case before the Court of Common Pleas, and the reasoning in the judgment of Lord Loughborough, C.J., is not less cogent here. His Lordship observed: "It is not stated that the plaintiff procured the appointment for the defendant (which would clearly have been brocage of office and bad) but that he made way for the appointment. But from thence no valuable consideration can arise. Had the transaction passed with the knowledge of the Admiralty judging of the case and applying at their discretion the allowance they are bound to make, possibly it might have stood fair with the public. I say possibly only ; to be sure the ground of deceit on the public would be done away. But this case rests on a private unauthenticated agreement between the officers themselves which cannot admit of any consideration sufficient to maintain an action. If it could be proved that it was to be measured by money so as to form a valuable consideration it must be in respect to the time when it was made, when the plaintiff was prevailed upon to retire in favour of the defendant. In this view it certainly would approach very near to brocage. It would differ very little in effect from selling the interest itself though there would be a difference, in the conduct of the party who in the one case would be passive; in the other active. But his passive merit, if I may use the expression, would not avail him where his active exertion would be a demerit." In short as between the parties to the note the transaction was virtually a trafficking with reference to an office the tendency of which must necessarily be to the injury of the public. The plaintiff is no doubt the indorsee of the note, but the note itself evidences notice to him of the character of the transaction.

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The decree of the lower Court must therefore be reversed and the suit dismissed. The parties will bear their costs throughout.

Against this judgment an appeal No. 18 of 1907 under clause 15 of the Letters Patent was presented and was dismissed by (Benson and Sankaran Nair, JJ.) on 17th October 1907.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. July 25, 31.

SESHA AYYAR (PETITIONER), APPELLANT,

v.

THE TINNEVELLY SARANGAPANI SUGAR MILL COMPANY LIMITED, THROUGH MR. F. S. CLARK, OFFICIAL LIQUIDATOR (RESPONDENT), RESPONDENT.*

Indian Companies Act—Act VI of 1882, *s.* 136—*Execution of decree against company in liquidation not to be prevented without making due provision for the right of judgment-creditor—Judgment-creditor attaching decree against company must be allowed to prove in the name of the decree-holder in liquidation.*

It will not be equitable for courts to prevent judgment-creditors under section 136 of the Companies Act, from executing decrees against a company in liquidation without seeing that such judgment-creditor's rights are respected in liquidation. *Klauber* v. *Weill*, (17 Times, L.R., 344), referred to. Where A in execution of a decree against B attaches, under section 273 of the Code of Civil Procedure, a decree which B holds against a company in liquidation, the Court will direct the liquidator to recognise A as the representative of B and allow him to prove for the decree debt in the name of B, and to receive and apply dividends payable to B in satisfaction of A's judgment debt subject to the rights of other attaching creditors to rateable distribution.

THE petitioner obtained a decree against one Syed Mahomed Rowther in Original Suit No. 468 of 1902 on the file of the Tinnevelly Munsif's Court. In execution of that decree the petitioner attached a decree obtained by his judgment-debtor against the respondent company, in Original Suit No. 84 of 1899 on the file of Tinnevelly Sub-Court. The attachment was made after the company had gone into liquidation. After the

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* Civil Miscellaneous Appeal No. 5 of 1907, presented against the order of C. G. Spencer, Esq., District Judge of Tinnevelly, in Interlocutory Application No. 430 of 1906 in Miscellaneous Petition No. 265 of 1903.

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SESHA AYYAR v. THE TINNEVELLY SARANGAPANI SUGAR MILL COMPANY LIMITED.

attachment the petitioner presented to the District Court of Tinnevelly in which the winding up proceedings were pending, the following petition:—

"For reasons stated in the affidavit herewith filed the petitioner prays that this Court may be pleased to recognise his claim of Rs. 5,062–8–0 and interest thereon as per decree in Original Suit No. 84 of 1899 on the file of the Tinnevelly Subordinate Judge's Court in favour of the decree-holder in that suit against the Tinnevelly Sarangapani Sugar Refining Company, Limited, in liquidation. He prays that his claim be recognised in the place of the judgment-debtor in Original Suit No. 468 of 1902 (and decree-holder in Original Suit No. 84 of 1899 on the file of the Tinnevelly Sub-Court) on the file of the Munsif's Court, Tinnevelly, to the extent of Rs. 5,062–8–0 plus interest therein as per terms of the decree towards the valuation of the decretal amount in the said Original Suit No. 468 of 1902."

On this petition the District Court passed the following

ORDER.—Heard both parties by their pleaders. The petitioner is not a direct creditor of the company. He has only attached the decree obtained by another man, who was a creditor against the company. This attachment was made after the winding up commenced. On the authority of I.L.R., 26 Madras, p. 673, I disallow the claim and dismiss the petition.

Petitioner appealed to the High Court.

K. Srinivasa Ayyangar for appellant.

Mr. *K. Ramanatha Shenai* for respondent.

JUDGMENT.—The petitioner obtained a decree in the Court of the District Munsif of Tinnevelly against one Syed Rowther. Syed Rowther had obtained a decree in the Subordinate Judge's Court of Tinnevelly against the Sarangapani Sugar Mill Company, and after this company had been ordered to be wound up the petitioner in execution of his decree against Syed Rowther attached Syed Rowther's decree against the Sarangapani Mill Company. The petitioner would, by virtue of his attachment, have been entitled under section 273, Code of Civil Procedure, to proceed to execute the decree against the company but for section 136 of the Indian Companies Act, which provides that, after the winding up order no suit or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court. It would not however be equitable for the Court to

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prevent the petitioner from executing his decree without seeing that his rights are respected in the liquidation, *Klauber* v. *Weill*(1). In order to secure this object we direct the liquidator to recognize the petitioner as the representative of the decree-holder, and allow him to prove for the decree debt in the name of the decree-holder and to receive and apply dividends payable to the decree-holder in satisfaction of his debt, subject to the like claims of other attaching creditors to rateable distribution. We must therefore allow the appeal, set aside the order of the lower Court and pass an order in the terms above stated with costs throughout. Cost of both parties will be paid out of the estate.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

SANKARA BHATTA (PETITIONER), APPELLANT,

v.

SUBRAYA BHATTA AND OTHERS (RESPONDENTS Nos. 1 TO 9), RESPONDENTS.*

1907. July 25.

Civil Procedure Code, Act XIV of 1882, *ss.* 108, 560, 582—*Limitation Act, Act XV of* 1877, *Arts.* 164, 169—*Art.* 164 *applies when unserved defendant seeks under s.* 108 *of the Code of Civil Procedure to set aside whole proceedings after appeal.*

After an appeal is filed against the decree of a lower Court, the power to set aside the original decree on an application under section 108 of the Code of Civil Procedure becomes vested in the Appellate Court by virtue of section 582 of the Code of Civil procedure.

Ramanadhan Chetti v. *Narayanan Chetti*, (I.L.R., 27 Mad., 602), referred to.

An application to the Appellate Court by a defendant, who was not duly served with summons in the lower Court and who, has not appealed to set aside the original decree under section 108 of the Code of Civil Procedure is, for purposes of limitation, governed by article 164 and not article 169 of schedule II of the Limitation Act.

THE facts for the purposes of this report are sufficiently set out in the judgment.

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(1) 17 Times, L.R., 344.

* Civil Miscellaneous Appeal No. 168 of 1906, presented against the order of H. O. D. Harding, Esq., District Judge of South Canara, dated 11th September 1906, in Interlocutory Application No. 187 of 1906 in Appeal Suit No. 30 of 1903.

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SANKARA BHATTA v. SUBBAYA BHATTA.

Mr. *K. Ramanatha Shenai* and *K. P. Madhava Rao* for appellant.

J. L. Rosario and *U. Babu Rau* for respondent.

JUDGMENT.—In this case the plaintiff obtained judgment against the defendants, some of whom appealed when the appeal was dismissed. One of the defendants now comes forward and states that he was never served and seeks to set aside the whole proceedings under sections 108 and 560.

The petitioner applied first to the District Munsif, but it was held by that Court that no application would lie to the District Munsif, because the filing of the appeal had divested the Munsif of his jurisdiction to deal with the case (*Ramanadhan Chetti* v. *Narayanan Chetti*(1)). This being so, the power to pass an order under section 108 must, by virtue of section 582, have become vested in the Appellate Court. This power is, we think, distinct from the power to set aside an *ex parte* appellate decree conferred by section 560, which only enables the Court to direct the appeal from the original decree to be reheard, thus temporarily restoring the orginal decree. With regard to the Limitation Act, article 164, we think, applies to any application which involves setting aside the original decree, that is to say, to any application under section 108, whether made to the original Court or to the Court of Appeal after an appeal has been filed, and article 169 applies only to applications "for rehearing of an appeal heard *ex parte* in the absence of the respondent." The starting point of limitation under article 169,—thirty days from the decree in appeal, is wholly inapplicable to applications by a party who has never been served to set aside the whole proceedings in the suit and we think that such applications are governed by the article 164. We must set aside the order of the District Judge and direct him to rehear the application and dispose of it according to law. Costs will abide the result.

(1) I.L.R., 27 Mad., 602.

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APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Wallis.

1907. July 8, 9.

PANDURANGA MUDALIAR (PETITIONER), APPELLANT,

v.

VYTHILINGA REDDI (RESPONDENT), RESPONDENT.*

Limitation Act, Act XV of 1877, *sched. II, arts,* 173*A,* 179—*Application in accordance with law—Civil Procedure Code, Act XIV of* 1882, *ss.* 2, 223, 258, 649—*Where a Court passes a decree for sale of property and the place where such property is situate, is transferred to the jurisdiction of another Court, former Court may still execute decree—Application made to such Court to transfer decree to the latter will save limitation-bar—Representative of judgment-debtor is judgment-debtor within the meaning of s.* 258 *and must certify adjustment within time fixed by art.* 173*A of sched. II of the Limitation Act.*

The Court at *C* passed a decree for the sale of certain immoveable property. Subsequently the territory where such property was situate was transferred to the jurisdiction of Court at *D*. The decree-holder applied to the Court at *C*, to transfer his decree for execution to the Court at *D*. The decree was transferred, and in execution, the purchaser of the equity of redemption from the judgment-debtor who was made a party to the execution proceedings pleaded that the application for execution was barred by limitation, and he also set up an adjustment between the judgment-debtor and the decree-holder made more than 90 days previously which was not certified to the Court. Questions arose whether the application to the Court at *C* for transfer was an 'application in accordance with law' within article 179 of schedule II to the Limitation Act, and whether the purchaser from the judgment-debtor could plead the uncertified adjustment:

Held, that the Court at *C* did not, within the meaning of section 649 of the Code of Civil Procedure, cease to exist or to have jurisdiction to execute the decree on the transfer of territory from its jurisdiction, as such transfer did not take away the jurisdiction which it had to execute its own decree under section 223 of the Code of Civil Procedure, and the Court at *D* consequently acquired no jurisdiction to execute the decree under section 649, which could only arise, if the Court at *C* either ceased to exist or to have jurisdiction to execute the decree. The Court at *C* was, therefore, the Court to which the decree-holder was bound to apply under section 223 of the Code of Civil Procedure, and his application saved the bar of limitation under article 179 of schedule II of the Limitation Act.

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* Civil Miscellaneous Second Appeal No. 74 of 1906, presented against the order of F. H. Hamnett, Esq., District Judge of South Arcot, in Appeal Suit No. 98 of 1906, presented against the order of M.R.Ry. S. Subbayya Sastri, District Munsif of Cuddalore, in Miscellaneous Petition No. 824 of 1905 (Original Suit No. 217 of 1895).

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PANDURANGA MUDALIAR v. VYTHILINGA REDDI.

Held also, that the provision of section 258 of the Code of Civil Procedure applied not only to judgment-debtors, but to those claiming through them or in their right, and that an adjustment between the decree-holder and the judgment-debtor not certified within 90 days was barred under article 173 (A) of schedule II of the Limitation Act, and cannot be set up as a bar to execution by one claiming through the judgment-debtor or in his right.

THE decree in execution of which this appeal arose was a mortgage decree passed by the Munsif's Court of Chidambaram in Original Suit No. 217 of 1895. The village in which the mortgaged properties were situate was transferred to the jurisdiction of the District Munsif of Cuddalore and, on the application of the decree-holder (respondent), dated 13th December 1900, the decree was transferred for execution to the Cuddalore Court. Applications for execution were made to the Cuddalore Court in October 1903 and in March, August, and September 1905. The first three applications were not prosecuted, and the property was ordered to be sold on 24th November 1905 on the last application. The petitioner on the 23rd November 1905 applied to be made a party to the execution proceedings on the ground that his undivided brother had purchased the property from the judgment-debtor. The petition was directed to be proceeded with under section 244 of the Code of Civil Procedure. The two objections raised by petitioner to the execution of the decree were that the decree-holder and the judgment-debtor had entered into an agreement by which the decree was adjusted in 1902, and, secondly, that the decree was barred by limitation, as the application for transfer in December 1900 was an unnecessary step, the Court of Cuddalore having jurisdiction to execute the decree under section 649 of the Code of Civil Procedure. Both the objections were overruled and execution ordered to proceed. This judgment was confirmed on appeal.

Petitioner appealed to the High Court.

V. Krishnaswami Ayyar and *T. V. Gopalaswami Mudaliar* for appellant.

P. R. Sundara Ayyar and *M. B. Doraiswami Ayyangar* for respondent.

JUDGMENT.—The Court of the District Munsif of Chidambaram passed a decree ordering the sale of certain property. Subsequently the territory in which the property is situated was excluded from the local limits of the Chidambaram Court and included in the local limits of the Cuddalore Court. After this

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alteration, as regards the local limits of these Courts, the decree-holder applied to the Chidambaram Court which passed the decree to transfer the decree to the Cuddalore Court for execution, and it was transferred accordingly. It is contended that this application to the Chidambaram Court was not sufficient to save the bar of limitation as it was unnecessary and not in accordance with law, because, it is argued, the Cuddalore Court had jurisdiction under these circumstances to execute the decree without any order of transfer by virtue of section 649 of the Civil Procedure Code, which provides that the word Court shall be deemed to include, where the Court which passed the decree to be executed has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed were instituted at the time of making application for execution of the decree, would have jurisdiction to try such suit, that is to say, in the present case, the Cuddalore Court. This jurisdiction to execute is only conferred where the Court which passed the decree has ceased to exist or to have jurisdiction to execute the decree. We cannot agree with the contention that the Chidambaram Court ceased to exist for the purposes of the section when the area in which the property ordered by the decree to be sold is situate was transferred to the jurisdiction of the Cuddalore Court. Nor can we hold that, by virtue of the transfer, the Chidambaram Court ceased to have jurisdiction to execute the decree. Section 223 provides that a decree may be executed by the Court that passed it, and we think there is nothing in section 649, and we know of no general principles to lead us to hold, that the transfer above mentioned had the effect of depriving the Chidambaram Court of Jurisdiction to execute the decree. It cannot, we may observe, be said that the transfer renders execution by the Chidambaram Court ineffective, and there are other cases in which the Code specially authorizes Courts to pass decrees affecting property situated out of the local limits of their jurisdiction. This conclusion is supported by some of the Calcutta cases to which our attention has been called on behalf of the respondent, notably *Kali Pado Mukerjee* v. *Dino Nath Mukerjee I*(1), but, proceeding as we do on the language of sections, we do not think it necessary to discuss the cases cited, some of which are not easily reconcileable.

(1) I.L.R., 25 Calc., 315.

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PANDURANGA MUDALIAR v. VYTHILINGA REDDI.

In our opinion, the Chidambaram Court was the one to which the decree-holder was bound to apply, and the application to it for transfer was a proper one and authorized by section 223. We, therefore, think the lower Appellate Court was right in holding that the application was not barred. The appellant further contends that, even supposing the application was not barred, the Court ought to have allowed him in his capacity of representative of the judgment-debtor by reason of his purchase, subsequent to the decree, of the equity of redemption in the suit property to show that the decree had been adjusted by an arrangement between the decree-holder and the judgment-debtor, although such adjustment was not certified either by the decree-holder or at the instance of the judgment-debtor as required by section 258 of the Civil Procedure Code. The alleged adjustment, however, was made more than ninety days before the appellant's petition was filed, and is *primâ facie* barred by article 173-A of the Limitation Act. It was, however, contended that, as the appellant is not the judgment-debtor, but only his representative, and having regard to the fact that the definition of judgment-debtor in section 2 of the Code of Civil Procedure does not mention representatives, the article does not apply to such representatives. If the word judgment-debtor, as used in section 258, does not include the representative of the judgment-debtor, it would follow that such a represeentive is not entitled to apply for the certificate without which the adjustment cannot be regarded by the Court executing the decree, and the appellant must fail on the ground that there was no adjustment which the Court could look at. We think, however, that the word judgment-debtor in section 258 should be construed as including those who claim through him or in his right. To hold otherwise would lead to obvious hardships which we cannot think were contemplated. In our opinion, the appellant is a judgment-debtor within the meaning of section 258 of the Code of Civil Procedure, and is accordingly barred by article 173-A of the Limitation Act.

With regard to the interest recoverable under the decree, the decree-holder is, by the terms of the decree as it stands, precluded from recovering any interest subsequent to the date of the decree, and the order of the lower Courts will be modified accordingly. The parties will pay and receive proportionate costs throughout.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

MAHALINGA MOOPANAR (RESPONDENT—TRANSFEREE PLAINTIFF), APPELLANT, 1907. August 14.

v.

KUPPANACHARIAR (PETITIONER—FIRST DEFENDANT), RESPONDENT.*

Limitation Act, XV of 1877, *sch. II, Art.* 179—'*Step in aid of execution*'—*Application to bring on record representative of deceased judgment-debtor is a step in aid of execution—Civil Procedure Code, Act XIV of* 1882, *ss.* 232, 368—*Application under section* 368 *not prohibited by section* 232.

Under the proviso to section 232 of the Code of Civil Procedure, the transferee of a decree cannot obtain execution without notice to the judgment-debtor, and where the judgment-debtor is dead, no such notice can be sent until his representatives are brought on record.

There is nothing in section 232 to prohibit the transferee from applying under section 368 to bring the representative on record and such an application must be regarded as a step in aid of execution within the meaning of schedule II of article 179 of the Limitation Act.

THE decree, in execution of which this appeal arose, was passed on 14th December 1900. An application to execute the decree was made on 23rd July 1902. Subsequently, the decree was assigned to the present appellant and, he, on 2nd September 1904 presented a petition praying (*a*) to be recognised as transferee-plaintiff, (*b*) for the fifth defendant to be brought on record as representative of the deceased second defendant and (*c*) for notice to plaintiff and defendants. The petitioner did not apply for execution of the decree. The order on this petition was "granted." The transferee-plaintiff applied to execute the decree in December 1905. It was objected by the first defendant that such application was barred as more than three years had elapsed since 23rd July 1902, the date of the last application for execution. On behalf of the transferee-plaintiff it was argued that the application of 2nd September 1904 was a step in aid of execution and that it saved the bar of limitation under article 179 of schedule II of the Limitation Act.

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* Civil Miscellaneous Second Appeal No. 88 of 1906 presented against the decree of R. F. Austin, Esq., District Judge of Tinnevelly, in Appeal Suit No. 79 of 1906 presented against the order of M.R.Ry. A. Annaswami Aiyar, District Munsif of Srivaikuntam, in M.P. No. 86 of 1906 (Original Suit No. 641 of 1900).

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The District Munsif held that the application of 2 September 1904 was a step in aid of execution and ordered exec tion to issue.

On appeal the District Judge held that the application of 2n September 1904 was not a step in aid of execution and dismiss the application. His judgment on this point is as follows :—

"If the petition of respondent of 2nd September 1904 was step in aid of execution, his present application for execution is time and appellant's petition was rightly rejected. If the petition of 2nd September 1904 was not a step in aid of execution, the present application was barred as being made more than three years after the last step in July 1902.

The order on the petition of 2nd September 1904 was 'granted'. What was granted is not clear. For, section 232 of the Civil Procedure Code contains no provision for a mere declaration of the right of an assignee of a decree to be substituted for the original decree-holder, but only for grant of permission to execute the decree. But for this respondent did not ask. So far as this portion of his petition went the Court granted him nothing, nor had he then any right to ask for substitution of second defendant's heir in a decree to which respondent was still a stranger. Section 368, Civil Procedure Code, moreover applies to cases of death of a defendant before decree. If respondent had any remedy under the decree against second defendant's heir, he must have brought in his name in actual execution proceedings, a necessary precedent to which was an application for execution under section 232, Civil Procedure Code, which respondent never made. I.L.R., 24 Cal., 778, which has been cited on behalf of respondent, is therefore inapplicable."

"I find that respondent's petition of 2nd September 1904 was not a step taken in aid of execution. His application for execution was therefore barred by limitation, being more than three years after the last step taken in July 1902."

The transferee-plaintiff appealed to the High Court.

The Hon. Mr. *P. S. Sivaswami Ayyar* for appellant.

The Hon. Sir *V. C. Desikachariar* and *K. Bhashyamayyangar* for respondent.

JUDGMENT.—The petitioner here prayed (*a*) to be recognized as the transferee-plaintiff, (*b*) for the fifth defendant to be brought on

MAHALINGA MOOPANAR v. KUPPANA-CHARIAR.

the record as heir of the second defendant and (c) for notice to the plaintiffs and defendants. The order on this petition was "granted." It is argued that there was no application by the transferee or order by the Court for execution as required by section 232, Civil Procedure Code, read with section 235, Civil Procedure Code, but it is unnecessary to consider this objection because the application under section 368, Civil Procedure Code, to bring in the representative of the second defendant was in our opinion a step in aid of execution sufficient to save limitation. Under the proviso to section 232 the Court cannot order execution in favour of the transferee without notice to the defendants, but if the defendants are dead, no such notice, as is contemplated by the section, can be sent until their representatives are brought on. There is nothing in section 232 to prohibit the transferee from applying for and obtaining an order under section 368, Civil Procedure Code, to bring in the representatives of a defendant, and we think such application must be regarded as a step in aid of execution. We must set aside the order of the District Judge and restore that of the District Munsif with costs in this and the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Wallis.

1907. August 19, 25.

MAHOMED SULTAN SAHIB AND ANOTHER (PLAINTIFFS), PETITIONERS,

v.

HORACE ROBINSON (DEFENDANT), RESPONDENT.*

Husband and wife—Implied authority of wife to pledge husband's credit when rebutted.

The presumption of implied authority on the part of the wife to pledge her husband's credit for necessaries may be rebutted by proof of circumstances inconsistent with the existence of such authority.

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* Civil Revision Petition No. 568 of 1906, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of J.C. Fernandez, Esquire, Subordinate Judge of the Nilgris, dated 30th July 1906, in Small Cause Suit No. 89 of 1906.

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MAHOMED SULTAN SAHIB *v.* HORACE ROBINSON.

Such authority cannot be presumed where the husband has expressly forbidden his wife to pledge his credit.

Jolly v. *Rees*, (15 C.B.N.S., 628), referred to.

SUIT for money.

The plaintiffs were traders, and this suit was brought by them to recover from the defendant, the price of articles supplied to his wife on the ground that, in purchasing such articles, she acted as the agent of defendant.

The defendant's wife was living in Ootacamund with her children while the defendant was residing in Coorg.

The defendant was remitting to her sums amply sufficient for her support and that of her children, and had expressly forbidden her to contract any debts on his credit. She kept a boarding house of which the plaintiffs were aware; and it was in evidence that the purchases were made largely on that account.

The Subordinate Judge held that no authority could be presumed under the circumstances and dismissed the plaintiffs' suit.

The plaintiffs filed Civil Revision Petition under section 25 of Act IX of 1887.

Mr. *A. S. Cowdell* for petitioner.

G. Krishnaswami Ayyar for respondent.

JUDGMENT.—I am not prepared to interfere with the decree of the Subordinate Judge. The provision made for the supply of necessaries to the wife out of the allowance made by the husband, and the payments made by the parents of the children boarding with her, was sufficient to rebut the presumption of implied authority to pledge the husband's credit for necessaries. (*Debenham* v. *Mellon*(1), and *Morel Brothers & Co.* v. *Westmoreland* (Earl of)(2).)

Further, there is evidence that the husband forbade his wife to pledge his credit which would bring the case within the authority of *Jolly* v. *Rees*(3). The petition is dismissed with costs.

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(1) 6 App. Cas., 24. (2) (1903) I.K.B., 64.
(3) 15 C.B.N.S., 628.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar.

IN THE MATTER OF MEDAI KALIANI ANNI (DEFENDANT), PETITIONER.*

1907. August 7.

Civil Procedure Code, Act XIV of 1882, s. 258—Right of suit—Judgment Creditor receiving payment and not certifying under s. 258 of the Code of Civil Procedure liable in damages though he has not executed and received the decree amount.

The law casts on a decree-holder receiving payment out of Court the duty of certifying such payment in satisfaction of the decree under section 258 of the Code of Civil Procedure. The judgment-debtor has a cause of action against the decree-holder, when the latter having received the decree amount not only does not certify, but actually takes out execution. It is not necessary that money should have been actually recovered in execution.

Viraraghava Reddi v. *Subbakka*, (I.L.R., 5 Mad., 387), referred to.

THE facts of this case were as follows :—

The defendant obtained a decree in Original Suit No. 127 of 1903 on the file of the District Munsif's Court, Tinnevelly, against the plaintiff's father. On the 17th November 1905, the plaintiff sent to the defendant Rs. 200 by money order stating in the coupon attached thereto that the amount should be credited towards the debt due by plaintiff's father. The defendant after receiving the amount fraudulently applied to execute the decree for the whole amount. The plaintiff objected to such execution, but his objection was resisted on the ground of limitation. Hence plaintiff sued to recover from defendant Rs. 214 being the principal and interest due. Defendant did not put in a written statement.

The lower Court granted a decree in favour of the plaintiff.

Defendant filed civil revision petition under section 25 of the Act IX of 1887.

T. R. Venkatarama Sastry for petitioner.

JUDGMENT.—The plaintiff remitted by a post office money order the amount due by him, under a decree to the defendant. The defendant received the amount of the money order, but failed to certify the receipt of the amount and enter up satisfaction

* Civil Revision Petition, No. 161 of 1907, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of M.R.Ry. T. V. Anantan Nayar, Subordinate Judge of Tinnevelly, in Small Cause Suit No. 574 of 1906.

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In the Matter of Medai Kaliani Anni.

of the decree. In the present suit brought for the recovery of the amount so paid as damages by reason of the defendant's failure to certify, the defendant, petitioner, put in no defence in the Court below. Mr. Venkatarama Sastry on her behalf now contends that as upon the plaintiff's own statement the decree in respect of which the payment was made out of Court has not been actually executed and the decree amount recovered, the plaintiff has no cause of action. In support of his contention he cites the unreported referred case No. 9 of 1905 which would seem to support it. In the judgment, however, the point is not discussed, and it merely expresses an opinion concurring with the view of the Subordinate Judge which was to the effect that because a decree in respect of which payment is made out of Court has not been actually executed and money recovered, the party making the payment had no cause of action. But the ground on which the Full Bench decision in *Viraraghava Reddy* v. *Subbakka*(1) rests is that the law casts on a decree-holder receiving payment out of Court the duty of certifying such payment in satisfaction of the decree, and that if he fails to do so, there is a breach of that duty. This, to my mind, necessarily implies that a cause of action accrues when the judgment-creditor fails to fulfil his duty in the matter.

In the present case after receiving payment, out of Court, the judgment-creditor not only did not certify payment but also applied for the execution of the decree as if there had been no payment out of Court. I must, therefore, hold that there was a cause of action.

No doubt in all the cases to which my attention was drawn by Mr. Venkatarama Sastry, there had not only been no certificate of satisfaction but the decree had also been executed and money recovered. But I do not think that such a recovery is essential to the accruing of the cause of action in a case like the present.

The petition therefore in my opinion fails and is dismissed.

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(1) I.L.R., 5 Mad., 397.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

HANIFA BAI (PLAINTIFF), PETITIONER,

v.

HAJI SIDDICK BUI MEANJI SAIT AND OTHERS (DEFENDANTS), RESPONDENTS.*

1906. October 9. 1907. August 6.

Civil Procedure Code, Act XIV of 1882, *ss.* 407, 592—*Pauper appeal—Applications under s.* 592 *to be decided under the rules in Chapter XXVI—No leave to appeal* in formâ pauperis *when at date of suit there is subsisting an agreement falling under section* 407 (*d*).

Although the question of the presentation of an appeal *in formâ pauperis* is not subject to the rules contained in Chapter XXVI of the Code of Civi Procedure, the question of the right to appeal under section 592 of the Code of Civil Procedure is subject to such rules.

Mailthi v. *Somappa Banta*, (I.L.R., 26 Mad., 369), distinguished.

When, at the time of the institution of the suit, there was subsisting an agreement falling within the terms of section 407 (*d*), no leave to appeal under section 592 can be given to the plaintiff who, by such agreement, had allowed other persons to obtain an interest in the subject-matter of the suit.

SUIT by plaintiff to recover properties as the heiress of her deceased husband. The Subordinate Judge dismissed the suit and plaintiff applied to the High Court for leave to appeal *in formâ pauperis* under section 592 of the Code of Civil Procedure.

K. Narayaua Rau for petitioner.

The Hon. Mr. *P. S. Sivaswami Ayyar* for respondents.

ORDER.—We are of opinion that the order of this Court of 9th October 1906 did not operate as a final disposal of the application for leave to appeal *in formâ pauperis*, and that it is open to this Court upon the receipt of the report on the inquiry which the Court of First Instance was ordered to hold to consider whether the case is one in which leave to appeal *in formâ pauperis* ought to be granted. In deciding this question it is the duty of the Court to have regard to the rules contained in Chapter XXVI, the right of appeal in our view of the construction of section 592 of the Code of Civil Procedure being subject to the rules contained

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* Civil Miscellaneous Petition, No. 1062 of 1906, presented under section 592 of the Code of Civil Procedure, to be allowed to appeal in *formâ pauperis* against the decree of J. C. Fernandez, Esq., Subordinate Judge of Nilgiris, Ootacamund, in Original Suit No. 35 of 1904.

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HANIFA BAI v. HAJI SIDDICK BUI MEANJI SAIT.

in that Chapter. All that was decided in *Mailthi* v. *Somappa Bunta*(1) was that the question of the presentation of the appeal was not subject to these rules. The question of the right of appeal does not arise till after the appeal has been presented.

It is not necessary for us to decide whether the Subordinate Judge went beyond the terms of the order of this Court in inquiring into the question of the agreements with reference to the subject-matter of the suit under which other persons obtained an interest in the subject-matter. He has, in fact, reported that such agreements were made, and it has not been denied on behalf of the plaintiff that, at the date of the institution of the suit, there was a subsisting agreement falling within the terms of section 407 (*d*). We see no reason to differ from the finding of the Subordinate Judge on the evidence before him that this agreement subsisted at the time of the presentation of the appeal. Even assuming that the affidavit on which Mr. Narayana Rau, on behalf of the plaintiff, relied is, in the circumstances of this case, admissible in evidence before this Court, it does not, in our judgment, show that the parties referred to in the affidavit were not interested in the subject-matter of the suit at the time the application for leave to appeal was presented.

We do not think the circumstances of this case are such as to warrant us in directing any further inquiry.

The application is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Subrahmania Ayyar.

1907. August 14.

IN THE MATTER OF CHINNAPPUDAYAN (PETITIONER).*

Criminal Procedure Code, Act V of 1898, *s.* 145—*Omission of Magistrate to state grounds for passing order is an irregularity and does not render the proceedings void, if no prejudice caused thereby.*

The omission of a Magistrate, in his order initiating proceedings under section 145 of the Code of Criminal Procedure, to state the grounds on which he

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(1) I.L.R., 26 Mad., 369.

* Criminal Revision Case, No. 246 of 1907, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of the Sub-divisional First-class Magistrate of Devakottai, dated 12th April 1907, in Miscellaneous Case No. 1 of 1907.

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is satisfied that there was a dispute likely to cause a breach of the peace, is an irregularity and will not, when the party is not prejudiced in the conduct of the inquiry by such omission, render the proceedings of the Magistrate void. Want of notice to one party in possession cannot be set up by another party who had notice and who appeared in the proceedings.

IN THE MATTER OF CHINNAPPUDAYAN.

ONE Annammal presented a petition to the Sub-divisional Magistrate of Devakottai to the effect that petitioner and another were threatening to trespass by violence on property belonging to her and praying that an inquiry may be made under section 144 of the Code of Criminal Procedure. On this, the Magistrate passed an order to the effect that he was satisfied of the existence of a dispute likely to cause a breach of peace, and issued notice to petitioner under section 145 of the Code of Criminal Procedure. No notice was issued to the other party. The Magistrate finally made an order against petitioner. Petitioner moved the High Court to set aside the proceedings of the Magistrate on the ground that his preliminary order did not state the grounds on which he was satisfied of the existence of a dispute likely to cause a breach of peace

S. Srinivasa Ayyar for petitioner.

ORDER.—Assuming that the order recorded by the Magistrate does not in terms state the grounds on which he came to the conclusion that there was a dispute likely to cause a breach of the peace, that is not a ground for holding that the proceeding is void as pointed out in the case of *Sayid Mahomed Ghouse Sahib* v. *Sayid Khadir Badshaw Sahib*(1), to which my attention has been drawn on behalf of the petitioner by Mr. Srinivasa Ayyar. That would, at the most, be an irregularity. And, unless I am satisfied that, in consequence, the petitioner was prejudiced in the conduct of the enquiry before the Magistrate, I ought not to interfere. It is not stated that, when the petitioner appeared before the Magistrate in pursuance of the notice, he took any objection with reference to the order in question. On the contrary, he proceeded to adduce evidence. The question of possession was determined upon the evidence thus adduced. I think he is not entitled to question the order.

It was next urged that in the petition put in by the complainant there was another person admitted to be in possession,

(1) 16 Mad. L.J., 148.

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IN THE MATTER OF CHINNAPPUDAYAN.

and, as no notice appears to have been served upon that party, the order should be treated on that ground as improper. The person, on whom it is said that no notice was served, has not chosen to appear and question the order. I think it would not be right to allow another party to take that objection.

The petition is dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1907. July 17, 25.

EMPEROR

v.

LAZAR.*

Penal Code—Act XLV of 1860, *s.* 494—*Native Christian having Christian wife living and marrying Hindu woman, guilty of bigamy under the section.*

A Native Christian, who, having a Christian wife living, marries a Hindu woman according to Hindu rites without renouncing his religion, is guilty of an offence under section 494, Indian Penal Code.

In re Millard, (I.L.R., 10 Mad., 218), followed in principle.

In re Ram Kumari, (I.L.R., 18 Calc., 264), followed in principle.

Proceedings, dated 8*th November* 1866, (3 M.H.C.R., App. VII), not followed.

Obiter: It will make no difference even if he had renounced the Christian religion before contracting the second marriage.

THE facts are fully stated in the letter of reference which is as follows:—

"The accused, a Police constable and a Native Roman Catholic Christian, married the complainant, who is also a native Roman Catholic Christian, in 1902 according to Christian rites. Both lived together till August 1906 when the complainant left for Rangoon. During the absence of the latter in Rangoon, the accused married a Hindu woman according to Hindu rites

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* Case referred No. 38 of 1907 (Criminal Revision Case No. 215 of 1907) for the opinion of the High Court under section 432 of the Code of Criminal Procedure by Mir Sultan Mohi-ud-din Sahib, Fourth Presidency Magistrate, Madras, in his letter, dated 23rd May 1907, Revision Criminal Case No. 9129 of 1907.

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without renouncing his religion. The complainant has now returned from Rangoon and charges the accused for an offence punishable under section 494, Indian Penal Code.

Under section 494, Indian Penal Code, 'whoever having a husband or wife living, marries in *any case in which such marriage is void by reason of its taking place during the life of such husband or wife*, shall be punished with imprisonment, &c.' In the present case, the second marriage was between a Roman Catholic Christian and a Hindu woman. Such a marriage not being a valid marriage, it is contended for the accused that the offence of bigmay has not been committed. The Valluvan (Native prohit), who performed the second marriage according to Hindu rites, deposes that he performed the marriage under the impression that the accused was a Hindu. It is urged on behalf of the prosecution that inasmuch as the formalities of a marriage were gone through, the accused has committed the offence, as his intention was not to keep his second wife as a concubine and the matter is not free from doubt. I therefore request you to be good enough to obtain the opinion of the High Court as to whether the second marriage was bigamous and the accused is liable for an offence under section 494, Indian Penal Code, and whether the accused should be committed to the sessions for trial."

The Acting Crown Prosecutor (Mr. *Nugent Grant*) for Crown.

The accused was not represented.

JUDGMENT.—According to the case stated in the reference a Native Christian having a Christian wife living married a Hindu woman according to Hindu rites without renouncing his religion and the question is whether he has been guilty of an offence under section 494 of the Indian Penal Code. The Crown Prosecutor has appeared and argued in support of a conviction, but the other side was not represented. We therefore took time to consider our judgment. In the result we are of opinion that on the facts stated there should be a conviction. The second marriage of the accused must be treated in law as an adulterous union, and therefore void within the terms of the section by reason of its taking place during the life-time of the first wife. In *Government of Bombay* v. *Ganga*(1), *In re Millard*(2) and *In the matter of Ram*

(1) I.L.R., 4 Bom., 330. (2) I.L.R., 10 Mad., 218.

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Kumari(1), it has been held having regard to the fact that Hindu Law does not recognize polygamous marriage by a woman, that a Hindu woman who having a Hindu husband living marries a Muhammadan or a Christian even after becoming a Muhammadan or Christian as the case may be commits bigamy as defined in section 494 of the Indian Penal Code. We think the same principles must be applied to the present case which is even stronger as here the accused is stated not to have renounced the Christian religion. According to the above decisions it would make no difference if he had. We have been referred to the decision of Holloway and Innes, JJ., in *Proceedings, dated 8th November* 1866(2), but the grounds of that decision are opposed to the decision of the Court for Crown Cases Reserved in England in *Reg* v. *Allen*(3), and we are not prepared to follow it. We may also observe that in that case the accused had become a Hindu before contracting the second marriage although as we have already said we are inclined to think that that makes no difference.

(1) I.L.R., 18 Calc., 264. (2) 3 M.H.C.R., App. VII.
(3) L.R., 1 C.C.R., 367.

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An appeal does not abate by reason of the failure of an appellant to bring on record the representative of a deceased respondent within the time prescribed therefor, if the appeal can proceed in the absence of such representative to a final and complete adjudication. Where a person paying off a prior mortgage, purchases a portion of the mortgaged properties in consideration of the amount so paid by him, the lien acquired by such payment is extinguished and cannot be used by such purchaser as a shield against a subsequent mortgagee. The assignee of a mortgage decree purchasing a portion of the mortgaged properties, acquires over such portion a lien for only a proportionate share of the mortgage amount. The implied covenant on the part of the mortgagor, under section 65 of the Transfer of Property Act, to pay the public charges on the properties mortgaged does not extend to the purchaser of the equity of redemption from the mortgagor. Such purchaser in omitting to pay such charges does not fail to discharge any obligation owing from him to a mortgagee of the said properties, and in purchasing such properties at a revenue sale for non-payment of such charges, he does not gain an advantage as qualified owner in derogation of the rights of the mortgagee or other persons interested in the property so as to constitute him a constructive trustee for them under section 90 of the Trusts Act.

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An execution creditor does not by attachment acquire such an interest in the attached property as will enable him to maintain an action for its wrongful removal. The rights of attaching creditors are regulated by

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the Code of Civil Procedure, and the provisions of section 91 (*f*) of the Transfer of Property Act do not apply to them. The remedy, if any of the attaching creditor is by proceedings in execution and not by separate suit. *Godu Ram* v. *Suraj Mal*, (I.L.R., 27 All., 378), doubted.

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A person in whose name property is purchased *benami* cannot sue in his own name unless he can show some right under the general law to maintain the suit as for instance as trustee or agent of an undisclosed principal. In *benami* sales, the legal estate does not in all cases rest in the benamidar, and constitute him a trustee for the real owner. Article 149 of schedule II of the Limitation Act applies only to suits brought by the Secretary of State or on his behalf and not to suits brought by persons deriving title from him.

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CIVIL PROCEDURE CODE—ACT XIV OF 1882, ss. 2, 223, 258, 649:—*See* "LIMITATION ACT, SCHED. II, ARTS. 173A, 179."

2. ———————————, **s. 13**—*Collector's decision under s.* 13 *of Act III of* 1895 *not questionable in subsequent suit in Civil Courts* :

Under section 13 of Act III of 1895, the Collector has jurisdiction to determine whether lands are the emoluments of an office or not, and the parties to the proceeding are debarred by section 13 of the Civil Procedure Code and the general principles of *res judicata* from re-agitating the same question subsequently in a Civil Court.

Balijepalli Seshayya v. *Balijepalli Subbayya* 320

3. ———————————, **ss. 13, 562**—*Decision disallowing permanent tenure, no* res judicata *in a subsequent suit to receive allowance—Adimayavana, nature of—Grant of allowance, presumption of—No remand when suit not determined on a preliminary point* :

Suit by A to recover *Adimayavana allowance* from B. In a previous suit by B against A for redeeming land, A had set up an irredeemable *Adimayavana tenure* in the land, which contention was overruled and a

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decree for redemption was made. The Court of First Instance held that the suit was barred by *res judicata* that the right to Adimayavana allowance was not proved and dismissed the suit. The lower Appellate Court reversed the judgment on both the points and remanded the suit for re-trial:—*Held*, by the High Court on appeal that the decision in the previous suit disallowing the *tenure* was no bar under section 13 of the Code of Civil Procedure to the present suit for the *allowance*. The word *Adimayavana* when applied to a tenure of land, imports a permanent tenure, but it may be used with reference to an allowance of money or grain rent charged on the land, and in that case it will not imply any tenure in favour of the grantee, but only an allowance. The fact that an allowance had been received out of certain lands for a long period from several successive owners, is proof of a grant of perpetual allowance charged on such land. *Vythilingam Pillay* v. *Kuthirevatath Nair*, (I.L.R., 29 Mad., 501), referred to and followed: *Held further*, that the decision of the Munsif on the right of the plaintiff to the perpetual allowance was not a decision on a preliminary point and the lower Appellate Court ought not to have remanded the suit under section 562 of the Code of Civil Procedure.

Mana Vikrama v. *Gopalan Nair* 203

4. ———————————, s. 27—*Court has power to order right persons to be substituted as plaintiffs even when original plaintiff had no right to sue*:

Under section 27 of the Code of Civil Procedure when a suit is instituted in the name of a wrong person as plaintiff by a *bonâ fide* mistake, the Court has power to substitute the names of right persons as plaintiffs and this power is not excluded in cases where the person originally suing has no right to institute the suit. *Chunder Coomar Roy* v. *Gocool Chunder Bhuttacharjee*, (I.L.R., 6 Calc., 370), referred to.

Krishna Boi v. *The Collector and Government Agent, Tanjore* 419

5. ———————————, ss. 102, 103 and 157—*Dismissal of suits—When plaintiff's pleader declines to proceed is dismissal for default within s. 102—Discretion in restoring such suit to file not to be interfered with on revision except on strong grounds*:

On the day on which a suit was posted for hearing, the plaintiff's pleader appeared and applied for an adjournment which was refused. The pleader declined to proceed with the suit, and the plaintiff, who was present in Court, took no steps. Thereupon the suit was dismissed in these words: 'The plaintiff's pleader said that he was not willing to proceed. So the suit was dismissed.' The plaintiff subsequently applied for restoration under sections 103 and 157 and the suit was restored to the file:—*Held*, that the dismissal of the suit under the above circumstances, was a dismissal for default under section 102, and that the order restoring the suit was rightly passed. A plaintiff 'fails to appear' within the meaning of section 102, when his pleader declines to proceed with the suit and it makes no difference that the party himself was present in Court: *Held also* that, under the circumstances, the order of restoration should not hav been interfered with on revision.

Gopala Row v. *Maria Susaya Pillai*... 274

6. ———————————, ss. 108, 540, 562, 564, 588 (9)— *On appeal against* ex-parte *decree, Court may reverse decree on the ground that it was wrongly decided* ex parte *and remand the case*:

When a suit is decided *ex parte* an Appellate Court to which an appeal from the decree is preferred under section 540 of the Code of Civil Procedure, has jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the suit *ex parte* and remand the suit for re-hearing. *Janardan Dobey* v. *Ramdhone Singh*, (I.L.R., 23 Calc., 738), not followed. *Parvatishankar* v. *Bai Naval*, (I.L.R., 17 Bom., 733), dissented from. *Caussanel* v. *Soures*, (I.L.R., 23 Mad., 260), dissented from. *Perumbara Nayar* v. *Subrahmanian Pattar*, (I.L.R., 23 Mad., 445), followed.

Sadhu Krishna Ayyar v. *Kuppan Ayyangar* 54

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7. ———————————————————, ss. 108, 560, 582—*Limitation Act, Act XV of 1877, arts. 164, 169—Art. 164 applies when unserved defendant seeks under s. 108 of the Code of Civil Procedure to set aside whole proceedings after appeal :*

After an appeal is filed against the decree of a lower Court, the power to set aside the original decree on an application under section 108 of the Code of Civil Procedure becomes vested in the Appellate Court by virtue of section 582 of the Code of Civil Procedure. *Ramanadhan Chetti* v. *Narayanan Chetti*, (I.L.R., 27 Mad., 602,) referred to. An application to the Appellate Court by a defendant, who was not duly served with summons in the lower Court and who has not appealed to set aside the original decree under section 108 of the Code of Civil Procedure is, for purposes of limitation, governed by article 64 and not article 169 of schedule II of the Limitation Act.

Sankara Bhatta v. *Subraya Bhatta* 535

8. ———————————————————, ss. 130—*Discretionary power of Court under s. 130 not interfered with on revision—Such power should be exercised with caution :*

The High Court will not in revision interfere where a lower Court, in the exercise of its discretionary power, refuses inspection of documents produced before it under a sealed cover in obedience to an order under section 130 of the Civil Procedure Code. The power of refusing inspection should, however, be exercised with great caution; and the opposite party should be allowed to inspect and take copies of the documents when they relate to matters in issue, unless they are privileged in law, relate *exclusively* to the case of the party producing them and contain nothing supporting or tending to support the other side.

Balamoney v. *Ramasami Chettiar* 230

9. ———————————————————, s. 244 :—*See* "LIMITATION ACT, SCHED. II, ARTS. 95, 120."

10. ———————————————————, s. 244 :—*See* "TRANSFER OF PROPERTY."

11. ———————————————————, s. 244 (c)—*Objection to validity of decree cannot be raised in execution proceedings :*

An objection by the defendant in a mortgage suit to the sale of properties directed to be sold by the decree in such suit, on the ground that such property is not liable for the decree is not an objection relating to the execution, discharge or satisfaction of the decree within the meaning of section 244 (c) of the Code of Civil Procedure but one questioning the validity of the decree itself and cannot be entertained in execution proceedings.

Kumaretta Servaigaran v. *Sabapathy Chettiar* 26

12. ———————————————————, ss. 244, 278—*Application in execution of decree against karnavan by a member of the tarwad :*

Where a decree is passed against the karnavan of a tarwad in his representative capacity, all the members of the tarwad must be held to be parties to the suit and such members in execution proceedings must proceed under section 244 of the Civil Procedure Code and not under section 278.

Marivittil Mathu Amma v. *Patharam Kunnot Cherukot* 215

13. ———————————————————, ss. 244, 310-A—*Appeal lies under s. 244 against an order rejecting an application under s. 310-A by a transferee of judgment-debtor after Court sale :*

The question of setting aside a sale in execution under section 310-A of the Code of Civil Procedure is a question relating to the execution of the decree within the meaning of section 244 of the Code of Civil

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Procedure even when the proceeds of such sale are sufficient to satisfy the decree and the auction-purchaser is a person other than the decree-holder. *Srinivasa Ayyangar* v. *Ayyathurai Pillai*, (I.L.R., 21 Mad., 416), followed. The auction-purchaser at a Court sale is the representative of the decree-holder for the purposes of section 244 of the Code of Civil Procedure. *Sandhu Tarangar* v. *Hussain Sahib*, (I.L.R., 28 Mad., 87), followed. *Bashir-ud-din* v. *Jhori Singh*, (I.L.R., 19 All., 140), not followed. *Mammod* v. *Locke*, (I.L.R., 20 Mad., 487), not followed. The transferee acquiring an interest in the property of the judgment-debtor after such property had been sold in execution, has a right to apply under section 310-A of the Code of Civil Procedure. *Husari Ram* v. *Bodai Ram*, (1 C.W.N., 279), dissented from. *Erode Manikkoth Krishnan Nair* v. *Puttiedeth Chembakkoseri Krishnan Nair*, (I.L.R., 26 Mad., 365), followed. An appeal lies under section 244 of the Code of Civil Procedure against an order passed on an application by such transferee to set aside the sale under section 310-A.

Manickka Odayan v. *Rajagopala Pillai* 507

14. ———————————————————, ss. 244, 331—*Defendants not joining in compromise on which decree is passed not judgment-debtors—Section 331 applies to such defendants:*

Where a decree passed on compromise entered into between the plaintiff and some of several defendants in a suit does not adjudicate on the rights of the defendants who have not joined in the compromise, such defendants are not judgment-debtors and any disputes arising in execution of the decree between the plaintiff and such defendants must be decided under section 331 and not under section 244 of the Code of Civil Procedure. *Vibhudapriya Thirthaswami* v. *Vidianidhi Thirthaswami*, (I.L.R., 22 Mad., 131), doubted.

Jathavedan Nambudiri v. *Kunchu Achan* 72

15. ———————————————————, s. 258—*Right of suit—Judgment-creditor receiving payment and not certifying under s. 258 of the Code of Civil Procedure liable in damages though he has not executed and received the decree amount:*

The law casts on a decree-holder receiving payment out of Court the duty of certifying such payment in satisfaction of the decree under section 258 of the Code of Civil Procedure. The judgment-debtor has a cause of action against the decree-holder, when the latter having received the decree amount not only does not certify, but actually takes out execution. It is not necessary that money should have been actually recovered in execution *Viraraghava Reddi* v. *Subbakka*, (I.L.R., 5 Mad., 387), referred to.

In the matter of Medai Kaliani Anni 545

16. ———————————————————, s. 266—*A hereditary allowance out of melwaram of lands attachable:*

A hereditary grant of an allowance of paddy out of the melwaram of certain land is not a right to future maintenance such as is exempted from attachment under section 266 of the Code of Civil Procedure.

Vaidyanatha Sastrial v. *Eggia Venkatarama Dikshitar* 279

17. ———————————————————, s. 266—*Attachment of married woman's property subject to restraint on anticipation—Section 10, Transfer of Property Act, Act IV of 1882—Section 8, Married Woman's Property Act, Act III of 1874—Property of married woman subject to restraint on anticipation not attachable in execution of a decree under section 8 of the Married Woman's Property Act:*

The income of property belonging to a married woman subject to a restraint on anticipation, accruing due after the date of a decree against such married woman's separate property under section 8 of the Married Woman's Property Act, is not liable to attachment in execution of such

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decree under section 266 of the Code of Civil Procedure or under Rule 220 of the Rules of the Presidency Court of Small Causes. Section 8 of the Married Woman's Property Act does not affect the doctrine of restraint on anticipation. *Hippolite* v. *Stuart,* (I.L.R., 12 Calc., 522), dissented from. *In re Mantel* and *Mantel,* (I.L.R., 18 Mad., 19), followed. Section 10 of the Transfer of Property Act recognises and renders enforceable conditions in restraint of anticipation and is not affected by section 8 of the Married Woman's Property Act. A decree under section 8 of the latter Act against the separate property of a married woman cannot be considered as passed against property which she is restrained from anticipating. Section 266 of the Code of Civil Procedure is only a rule of procedure, and is not exhaustive. It cannot be construed as authorising the attachment of property which, by the rule of substantive law embodied in section 10 of the Transfer of Property Act, is incapable of being transferred or charged by the beneficiary.

Mrs. Goudoin v. *Vencatesa Moodally* 378

18. ——————————, s. 310-A—*Person acquiring interest in property after Court sale, within a month, can apply under s. 310-A :*

Where property is sold in execution of a decree, a person acquiring an interest in such property from the judgment-debtor within a month after such sale, is entitled to maintain an application under section 310-A of the Code of Civil Procedure. *Hazari Ram* v. *Badai Ram and Nando Lal,* (1 C.W.N., 279), dissented from.

Appaya Shetti v. *Kunhati Peari* 214

19. ——————————, s. 375—*Incorporation in compromise decree of terms which are not unlawful, though outside the scope of suit cannot be objected to in execution :*

Where a compromise between the parties to a suit embraces matters not relating to the suit, and the decree following such compromise gives reliefs which are not unlawful, but which could not have been given if the suit had been decided after trial, any objection to such decree on the ground that it is in contravention of section 375 of the Code of Civil Procedure, must be taken by way of appeal and not in execution of the decree. *Venkatappa Nayanim* v. *Thimma Nayanim,* (I.L.R, 18 Mad., 410), referred to. *Mahibulla* v. *Imami,* (I.L.R., 9 All., 229), referred to. *Kuruvetappa* v. *Sirasappa,* (16 M.L.J., 354), referred to.

The Manager of Sri Meenakshi Devastanam, Madura v. *Abdul Kasim Sahib* ... 421

20. ——————————, s. 375—'*Lawful agreement or compromise*'—'*Relates to the suit*'—*Compromise in a suit for money by which the agreed amount is charged on property is lawful and the relief by way of charge* '*relates to the suit*' *:*

The language of section 375 of the Code of Civil Procedure is wide and general and does not preclude parties from setting their disputes on such lawful terms as they might agree to without being restricted to such relief as one only of the parties had chosen to claim in the plaint. In a suit for money, where the plaint prays for a simple money decree, an agreement, by which the parties agree that the amount decreed according to the compromise should be a charge on certain properties, is 'lawful' and 'relates to the suit' so as to be embodied in the decree.

Joti Karuvetappa v. *Isari Sirusappa* 478

21. ——————————, ss. 407, 592—*Pauper appeal—Applications under s. 592 to be decided under the rules in Chapter XXVI—No leave to appeal* in formâ pauperis *when at date of suit there is subsisting an agreement falling under section 407 (d) :*

Although the question of the presentation of an appeal *in formâ pauperis* is not subject to the rules contained in Chapter XXVI of the Code of Civil Procedure, the question of the right to appeal under section 592 of

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the Code of Civil Procedure is subject to such rules. *Mailthi* v. *Somappa Banta*, (I.L.R., 26 Mad., 369), distinguished. When, at the time of the institution of the suit, there was subsisting an agreement falling within the terms of section 407 (*d*), no leave to appeal under section 592 can be given to the plaintiff who, by such agreement, had allowed other persons to obtain an interest in the subject-matter of the suit.

Hanifa Bai v. *Haji Siddick Bui Meanji Sait* 547

22. ——————————, s. 544—*Ground common to all the defendants—Decree against all defendants may be reversed on appeal by one against the whole decree when such decree has proceeded on a ground common to all:*

When the decree of the lower Court proceeds on a ground common to all the defendants, the Appellate Court under section 544 of the Code of Civil Procedure, may, on appeal by one of the defendants against the whole decree, reverse the decree in so far as it affects other defendants though they have not joined in the appeal. It is enough if any one ground on which the decree appealed against proceeds is common to all the defendants. *Syed Hussain* v. *Madhan Khan*, (I.L.R., 17 Mad., 265), overruled. *Seshadri* v. *Krishnan*, (I.L.R., 8 Mad., 192), approved.

Dhuttaloor Subbayya v. *Paidigantam Subbayya* 470

23. ——————————, s. 586—*No second appeal where unnecessary prayer for declaration in suit of Small Cause nature:*

When all the reliefs which the plaintiff claims in a suit could have been obtained without asking for a declaration, the addition of a prayer for a declaration will not prevent the suit from being of the nature cognisable by a Court of Small Causes within the meaning of section 586 of the Code of Civil Procedure if without such declaration it is so cognisable.

Ramachendraiyar v. *Noorulla Sahib* 101

24. ——————————, s. 586—*Provincial Small Cause Court Act IX of 1887, sched. II, art. 41—No second appeal wherein suits for contribution debt in respect of which contribution is sought, is created by the payment itself—Appealability determined by subject-matter of suit and not by amount claimed in execution:*

The suits for contribution exempted from the jurisdiction of Courts of Small Causes by schedule II, Act IX of 1887, are suits in which contribution is claimed in respect of payment made by a sharer of money due from a co-sharer. The exemption does not apply to cases where no debt was due from the co-sharer prior to payment, but contribution is sought in respect of a debt which became due only by virtue of such payment. In such cases no second appeal will lie under section 586 of the Code of Civil Procedure if the subject-matter of the suit is less than Rs. 500. In determining whether second appeals lie in such cases in execution proceedings, the amount of subject-matter of the suit and not the amount sought to be recovered in execution must be taken into consideration.

Mavula Ammal v. *Mavula Maracoir* 212

25. ——————————, s. 622—*District Registrar—not a 'Court' within the meaning of:*

A District Registrar is not a Court within the meaning of section 622 of the Code of Civil Procedure, and the High Court cannot interfere with his proceedings under that section. *Atchayya* v. *Gangayya*, (I.L.R., 15 Mad., 138), distinguished.

Manavala Goundan v. *Kumarappa Reddy* 326

26. ——————————, s. 646 (B):—*See* "JURISDICTION."

CONTACRT ACT—ACT IX OF 1872, s. 20:—*See* "COVENANT CONSTRUCTION OF."

2. ——————————, s. 23—*Promise to pay money to procure resignation of public office not enforceable:*

An undertaking to pay money to a public servant, to induce him to retire and thus make way for the appointment of the promisor, is virtually a

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trafficking with reference to an office and is void under section 23 of the Contract Act. *Parsons* v. *Thompson*, (I.H.Bl., 322, 2 R.R., 773), followed in principle.

Saminatha Aiyar v. *Muthusami Pillai* 530

3. ———————————, s. 69—*Money voluntarily paid cannot be recovered back unless the party for whom such payment is made is bound to pay it—Revenue Recovery Act II of* 1864, *s.* 35—*Applies only where party paying is tenant, mortgagor, or incumbrancer—Unregistered owner not bound to pay the revenue:*

An action to recover money paid is not maintainable under section 69 of the Indian Contract Act, unless the person from whom it is sought to be recovered was bound to pay it. On this point the law under section 69 of the Indian Contract Act is the same as the English Law. *Bonner* v. *Tottenham and Edmonton Permanent Investment Buildings Society*, (1899, 1 Q.B., 161), referred to. The revenue due on land owned by one who is not the registered holder is not money which such owner is bound to pay under the Revenue Recovery Act, though it may be to his interest to do so and the registered holder voluntarily paying such revenue cannot recover it under section 69 of the Contract Act. Neither can he recover it under section 35 of the Revenue Recovery Act unless he is a tenant, mortgagor or incumbrancer of such land.

Boja Sellappa Reddy v. *Vridhachala Reddy* 35

4. ———————————, s. 69—*Money paid by purchaser towards an incumbrance subject to which he buys, not recoverable under*—Res judicata—*Erroneous decision on a question of law how far a bar in subsequent suit:*

Where a purchaser of property at a Court sale purchases it subject to a charge for maintenance, such purchaser cannot, under section 69 of the Contract Act, recover from the owner in whose hands it was so liable, payments made by him (the purchaser) towards maintenance to prevent the sale of the property. An erroneous decision on a question of law in a previous suit is no bar, in a subsequent suit between the same parties, to the Court deciding the same question, provided the decision in the latter suit does not in any way question the correctness of the former decree or in any way affect its operation. *Gopu Kolandavelu Chetty* v. *Sami Royar*, (I.L.R., 28 Mad., 517), referred to. *Alimunissa Chowdhurani* v. *Shama Charan Roy*, (I.L.R., 32 Calc., 749), referred to. *Koyyana Chittamma* v. *Doosy Govaramma*, (I.L.R., 29 Mad., 225), referred to.

Mangalathammal v. *Narayanswami Aiyar* 461

5. ———————————, s. 69—*Section applies only in cases where one person pays money which another is bound to pay—Payment must be to another person:*

Section 69 of the Contract Act applies only where one person pays to *another* money which a third party is bound to pay. Where Government, as mulgeni tenant pays to itself the assessment payable by the mulgar (landlord), it is not a payment by Government to another person, and the amount so paid or retained cannot be recovered from the mulgar under section 69 of the Contract Act. *Quære:* Whether the Government can be held to have such an interest as will bring it within the section, as the sale, to avert which the payment is made, can be brought about only by its own orders.

The Secretary of State for India v. *Fernandes* 375

6. ———————————, s. 70—*Inamdar taking water for which zamindar is compelled to pay water-cess must recoup zamindar:*

When the holder of an inam within a zamindari takes for his benefit Government water and the zamindar, whose moveable and immoveable properties are liable for the payment of the cess to Government, pays them, the latter can recover the amount of cess so paid from the inamdar

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under section 70 of the Contract Act. The Zamindar must be considered as rendering himself liable for the benefit of the inamdar and as not intending to do so gratuitously.

The Rajah of Venkatagiri v. *Vudutha Subbarayudu* 277

CONTRIBUTION—*Co-heir not liable to contribute towards expenses incurred by other heirs in litigation in respect of common property:*

A co-heir is not liable, either under an implied contract or on grounds of equity to contribute towards the expenses of litigation *boná fide* carried on by other heirs in respect of the common property. *Dakshina Mohan Roy* v. *Saroda Mohan Roy*, (I.L.R., 21 Calc., 142), referred to.

Halima Bee v. *Roshan Bee* 526

COURT FEES ACT VII OF 1870, s. 2—*Does not contemplate the fixing by the decree of a time for payment of extra Court-fees—Where Court fixed such time, payment within such time no condition precedent to execution:*

It is not intended by the first part of section 2 of the Court Fees Act that the Court should fix a time for the payment of the extra Court-fee in respect of mesne profits subsequent to the institution of the suit but that execution in respect of such profits should be stayed till such payment is made. Where the Court by its decree directs the payment of such Court-fees within a fixed time, such direction is no part of the decree and execution of the decree is not conditional on payment within the time so fixed.

Perianan Chetti v. *Nagappa Mudaliar* 32

2. ——————————, s. 7, para. iv, cl. (c)—*Suit for declaring invalidity of document, which plaintiff is not bound to have set aside is not a suit for declaration and consequential relief within section—Jurisdiction—Rule 2 of rules under s. 9 of Suits Valuation Act:*

In order to determine whether a suit falls under section 7, paragraph IV, clause (c) of the Court Fees Act, the substance of the plaint and not the words which plaintiff chooses to use, must be considered. A person may rely on the invalidity of a void instrument as against himself without suing for its cancellation; and a suit by him for declaring the invalidity of such instrument will not be a suit for declaration and consequential relief under section 7, paragraph IV, clause (c) of the Court Fees Act. It will be otherwise where the party cannot impeach the arrangement effected by the deed without having it cancelled. A transaction by the Karnavan of a Tarwad is void against members not consenting thereto, if it is in excess of his powers as such Karnavan. In declaratory suits where no consequential relief is prayed, the value for purposes of jurisdiction is the value of the property likely to be effected by the declaration and rule 2 of the Rules of the High Court of 26th February 1903 does not apply to such cases.

Chingacham Vitil Sankaran Nair v. *Chingacham Vitil Gopala Menon* ... 18

3. ——————————, s. 7, sched. I, art. I—*Appeal, valuation of, when no amount claimed, but dispute about liability of certain properties—Value of such properties proper valuation of the appeal:*

Section 7 of the Court Fees Act has no application in the case of appeals in which no amount is claimed. Where the appellant in an appeal against a mortgage decree does not dispute the amount decreed, but raises the question of the liability of certain properties for the decree amount, the value of the appeal, for the purpose of Court fees, under Article I of schedule I of the Court Fees Act, is the value of such properties, when such value is less than the amount decreed and when such value exceeds the amount decreed, such decree amount. *Venkappa* v. *Narasimha*, (I.L.R., 10 Mad., 187), followed. *Krishnama Chariar* v. *Srinivasa Ayyangar*, (I.L.R., 4 Mad., 339), followed.

Kesavarapu Ramakrishna Reddi v. *Kotta Kota Reddi* 96

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4. ———————————————, s. 17—'*Two or more distinct subjects'—First part of section applies to cases where alternative reliefs on different causes of action are joined in one suit—Malabar Law—Ubhayapattom—Agreement in mortgage perpetually void as a clog on the equity of redemption :*

The operation of section 17 of the Court Fees Act is not necessarily confined to cases where cumulative reliefs are claimed. Alternative claims, forming different matters which could have been made the grounds of separate suits are 'distinct subjects' within the meaning of the section, although they arise out of the same instrument and a suit for enforcing such alternative claims ought to be valued for the purpose of court-fees as also of jurisdiction on the aggregate value of such reliefs. *Kashinath Narayan* v. *Govinda Bin Piraji*, (I.L.R., 15 Bom., 82), not followed. An 'Ubhayapattom' is a kanom mortgage. Where from the terms of an Ubhayapattom it is clear that the debt was not intended to be extinguished, a covenant for perpetual renewal by the motgagor operates as a clog on the equity of redemption and the addition of the words 'you shall hold the properties for ever without surrendering them' does not convert such a transaction into an immediate grant of a permanent interest. Such a covenant will be inoperative as a clog on the mortgagor's right of redemption in a mortgage executed before the passing of the Transfer of Property Act and subsequent to 1858, on the principles of equity which formed the basis of judicial decisions during that period.

Neelakandhan Nambudripad v. *Tirunilai Ananthakrishna Ayyar* 61

COVENANT, CONSTRUCTION OF—TRANSFER OF PROPERTY ACT—ACT IV OF 1882, ss. 55 and 59—*What amounts to a 'contract to the contrary' within the meaning of section—Contract Act—Act IX of* 1872, *s.* 20—*Mistake does not prevent the party from claiming the protection of a special covenant—Want of attestation as laid down in s.* 59 *of the Transfer of Property Act, will not bar the personal remedy :*

A, who had brought a suit to recover the amount due on a mortgage executed to him, assigned to *B* for valuable consideration all his claims under the mortgage deed and in the suit brought by *A*. The assignment contained a covenant that '*A*, his executors or administrators shall not be liable for any defect in the claim hereby transferred and assigned or for any sums of money that may not be recovered.' Subsequent to the assignment, *B* was added as a co-plaintiff in the suit brought by *A* and it was discovered that the mortgage executed to *A* was inoperative as it was attested by only one witness and the suit was withdrawn. *B* filed a suit against *A* for a declaration that the contract of assignment was void and for a return of the consideration paid :—*Held*, that *A* was entitled to claim the benefit of the covenant, which exempted him from any liability, even though both *A* and *B* acted under the mistaken belief that the mortgage was valid and that *A* was not bound to refund the consideration received. *Per* Sir ARNOLD WHITE, C.J.—The covenant is a 'contract to the contrary' within the meaning of section 55 of the Transfer of Property Act which will negative the statutory covenant of title under the section. *Per* S. SUBRAHMANIA AYYAR, J.—Non-compliance with the rule laid down in section 59 of the Transfer of Property Act as to attestation does not render the personal covenant void. *Madras Deposit and Benefit Society, Limited* v. *Oonnamalai Ammal*, (I.L.R., 18 Mad., 29); not approved. The existence of a separate warranty in a contract is evidence that the matter of the warranty is not a condition or essential part of a contract, a mistake in regard to which will render the contract void under section 20 of the Contract Act.

Sada Kavaur v. *Tadepally Basaviah* 284

CRIMINAL PROCEDURE CODE—ACT V OF 1898, s. 106 (3)—*Order for security cannot be made by Appellate Court when original conviction not by one of the Courts specified in the section :*

An order for security cannot be made under section 106 (3) of the Code of Criminal Procedure by a Court of Appeal or Revision which is one of the Courts specified in the section, when confirming the original

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conviction of a Court which is not one of those specified therein. *Muthia Chetty* v. *Emperor*, (I.L.R., 29 Mad., 190), referred to and doubted.

Dorasami Naidu v. *Emperor* 182

2. ————————————————, s. 106—*Sentence, enhancement on appeal—Maintaining a sentence in its entirety though acquitting on some of several charges is enhancement—Appellate Court cannot make an order for security when original conviction not by one of the Courts specified in section* 106 :

Where the Magistrate convicted the accused of two distinct offences and passed only a single sentence for both and the Appellate Court acquitting the accused of one of the offences maintained the sentence in its entirety :—*Held*, that this amounted to an enhancement of the sentence passed for the offence, the conviction for which alone was maintained. An order for security under section 106 of the Code of Criminal Procedure cannot be made by the Appellate Court unless the conviction appealed against was by a Court of the description specified in the first paragraph of the section.

Paramasiva Pillai v. *Emperor* 48

3. ————————————————, ss. 107, 112, 117—*Order for security not to be made without recording legal evidence :*

An order requiring a person to furnish security has the effect of a conviction, as the person so required is liable to imprisonment if he fails to comply with the order. Such an order ought not to be passed without formal evidence being recorded. *Reg* v. *Jinji Limji*, (6 B.H.C.R.Cr.C. 1), referred to. *Reg* v. *Talpatram Pamabhai*, (5 B.H.C.R.Cr.C. 106), referred to.

Prathipati Venkatasami v. *Emperor* 330

4. ————————————————, ss. 110 (*e*), 112, 107—*Enquiry under s.* 107 *illegal without issuing notice under s.* 112 :

A Magistrate before taking action under section 107 of the Code of Criminal Procedure is bound to issue the notice required by section 112 and his omission to do so is an illegality which will render the subsequent proceedings invalid. A notice issued with reference to section 110 (*e*) is not sufficient as a preliminary to the Magistrate making an order under section 107.

Krishnaswami Thathachari v. *Vanamamalai Bhashiakar* 282

5. ————————————————, s. 145—*Omission of Magistrate to state grounds for passing order is an irregularity and does not render the proceedings void, if no prejudice caused thereby :*

The omission of a Magistrate, in his order initiating proceedings under section 145 of the Code of Criminal Procedure, to state the grounds on which he is satisfied that there was a dispute likely to cause a breach of the peace, is an irregularity and will not, when the party is not prejudiced in the conduct of the inquiry by such omission, render the proceedings of the Magistrate void. Want of notice to one party in possession cannot be set up by another party who had notice and who appeared in the proceedings.

In the matter of Chinnappudayan 548

6. ————————————————, ss. 162, 164—*Right of accused to copies of statements made by Magistrate under :*

An accused person under remand is not, before the commencement of the preliminary inquiry, entitled to be furnished with copies of statements made on oath by various persons and recorded by the Magistrate under sections 162 and 164 of Code of Criminal Procedure. No such right is conferred by the Code of Criminal Procedure and the question whether any person has a right to inspect a public document is outside the scope of the Evidence Act. Such statements may, however, be put to contradict the persons making them when called as witnesses and it will then form

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part of the record, of which the accused will be entitled to a copy after commitment. There is no general principle of common law which would entitle an accused person to copies of such documents. *Queen-Empress* v. *Arumugam*, (I.L.R., 20 Mad., 189), distinguished.

Emperor v. *Muthia Swamiyar* 466

7. ——————————, s. 195—*On appeal against order granting sanction—District Court has no power to remand for further inquiry—Section 647 of the Civil Procedure Code does not apply to proceedings under s.* 195 *of the Criminal Procedure Code—Letters Patent, cl.* 15—*Judgment, what is :*

An order of a single Judge rejecting a revision petition presented under section 622 of the Civil Procedure Code on the ground that the objection taken therein is unfounded is a 'judgment' within the meaning of clause 15 of the Letters Patent and appealable as such. The powers conferred under section 195 of the Code of Criminal Procedure are of a very special nature and no inherent jurisdiction can be attributed to any Court in the exercise of such powers, unless it is incident to their proper exercise. A Court to which an appeal is presented against an order granting or refusing sanction under section 195 of the Code of Criminal Procedure has no power to remand the case for a fresh inquiry. Section 647 of the Code of Civil Procedure does not make the provisions of the Code of Civil Procedure applicable to proceedings under section 195 of the Code of Criminal Procedure.

Rama Ayyar v. *Venkatachella Padayachi* 811

8. ——————————, s. 195 (6)—*Appeal lies to High Court against an appellate order revoking sanction granted by Court of First Instance :*

The right of appeal conferred by section 195 (6) of the Code of Criminal Procedure as read with sub-section (7) of the same section, is not restricted to a right of appeal to the Appellate Court to which the Court of First Instance is immediately subordinate. The revocation by the Appellate Court of a sanction given by the Court of First Instance, is a refusal of sanction within the meaning of sub-section (6) and an appeal lies therefrom to the High Court, as well as in cases where the sanction refused by the Court of First Instance is granted by the Appellate Court. *Palaniappa Chetty* v. *Annamalai Chetti*, (I.L.R., 27 Mad., 223), approved. An order revoking a sanction is a refusal of a sanction just as an order confirming a sanction is an order giving a sanction.

Muthuswami Mudali v. *Veeni Chetti* 382

9. ——————————, ss. 215, 436—*Section* 215 *applies only to a commitment actually made and not to order by Sessions Judge directing committal :*

The provisions of section 215 of the Code of Criminal Procedure apply only to a commitment actually made and not to a case where a Sessions Judge in exercise of the powers, vested in him by section 436 of the Code, sets aside an order of discharge made by a Magistrate and directs a committal to the Sessions. In such cases the High Court may consider the facts, as well as the questions of law involved, to determine whether the Sessions Judge has exercised a proper discretion. *Pirthi Chand Lal* v. *Sampatia*, (7 C.W.N., 327), referred to.

Muthia Chetty v. *Emperor* 224

10. ——————————, ss. 222, 233, 234 and 235—*Three distinct offences of criminal breach of trust and three distinct offences of falsifying accounts cannot be tried together :*

It is illegal to try a person on a charge which alleges three distinct acts of criminal breach of trust and three distinct acts of falsifying accounts. Section 234 of the Code of Criminal Procedure will not apply, as the offences of criminal breach of trust and falsification of accounts are not of the same kind; neither will section 235 cover the case, as the several offences cannot be said to form part of the same transaction. *King-Emperor* v. *Nathlal Bapuji*, (4 Bom. L.R., 433), referred to. Although,

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under section 222 of the Code of Criminal Procedure, a charge for the gross amount misappropriated within a period of twelve months shall be deemed to be a charge of one offence within section 234, it does not follow that the acts so charged should be considered to be one transaction within the meaning of section 235.

Kasi Visvanathan v. *Emperor* 328

11. ——————————, ss. 297, 537—*Misdirection to jury—Judge bound to state all the elements of offence and deal with evidence, differentiating evidence against each of the accused—Failure to do so not a mere irregularity ;*

Under section 297 of the Code of Criminal Procedure, the Judge must explain to the jury all the essential elements of the offence with which the prisoner is charged. An omission to do so is not a mere irregularity within the meaning of section 537. It is a failure to comply with an express provision of the law and will vitiate the conviction. The Judge should also point out to the jury the evidence against each of the accused and the circumstances which distinguish the cases of some of the accused from that of the others. *Mangan Das* v. *Emperor*, (I.L.R., 29 Calc., 379), referred to and followed.

Mari Valayan v. *Emperor* 44

12. ——————————, s. 307—*Jury not to be questioned as to reasons for verdict :*

When the jury return a verdict on the general issue of guilty or not guilty and there is no ambiguity as to the precise offence of which the accused are convicted or acquitted, the Sessions Judge has no power, under section 307 of the Code of Criminal Procedure, to question the jury as to the reasons for their verdict.

Emperor v. *Siranadu* 469

13. ——————————, ss. 307, 310—*Accused cannot be asked to plead to prior convictions when case referred to High Court under s. 307, before the High Court convicts on such reference :*

Sections 307 and 310 of the Code of Criminal Procedure clearly provide that an accused is not to be asked to plead to prior convictions until he has been convicted on the charge under trial. Where a Court of Sessions makes a reference to the High Court under section 307 of the Code of Criminal Procedure, there is no conviction or acquittal in the Sessions Court and it is only after conviction by the High Court that the accused can be asked to plead to prior convictions.

Emperor v. *Kandasami Goundan* 134

14. ——————————, ss. 408, 435—*Jurisdiction—Appeal from First-class Magistrate lies to the Sessions Court, within whose jurisdiction the Court of the Magistrate ordinarily sits—'Situate' meaning of :*

The Court of Sessions to which appeals lie from Magistrates of the First Class under section 408 of the Code of Criminal Procedure in the Court of Sessions within the local limits of whose jurisdiction the Court of such Magistrate ordinarily sits, whether the offence be committed within such local limits or not. The word 'situate' in section 435 of the Code of Criminal Procedure refers to the place where the inferior Courts mentioned therein ordinarily sit. The principle laid down in section 435 in regard to revisional powers must, in the absence of any indication to the contrary in the Code, be followed in the case of appeals under section 408.

Valia Ambu Paduval v. *Emperor* 136

15. ——————————, s. 423—*Sentence, enhancement of—No enhancement when aggregate period of imprisonment reduced, although fine imposed in addition :*

Where the aggregate period of imprisonment awarded on appeal is to any extent less than the period of the original sentence, the fact that a fine is imposed by the Appellate Court is no enhancement of the sentence

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within the meaning of section 423 of the Code of Criminal Procedure. Where the Appellate Court reduced a sentence of one month's imprisonment to five days but imposed in addition a fine with two weeks' imprisonment in default :—*Held*, that the sentence of the Appellate Court was not illegal.

Bhakthavatsulu Naidu v. *Emperor* 103

16. ——————————————, ss. 423 (1) 528—*Appellate Court can itself try the offender—Cognizance in such cases under s.* 190 (*b*) *and not* 190 (*c*)—*Section* 423 (1) (*b*) *of the Code of Criminal Procedure ought to be read with s.* 528 *of the Code :*

The provisions of section 423 (1) (*b*) do not preclude an Appellate Court, when it reverses the finding and sentence under appeal, from trying the offender itself, if the offence is one ordinarily triable by it. In such cases, the Appellate Court takes cognizance under section 190 (*b*) and not section 190 (*c*).

Emperor v. *Manikka Gramani* 228

17. ——————————————, s. 488, cl. 4—*Living in adultery, refer to course of conduct :*

A single act of adultery does not necessarily amount to "Living in adultery" within the meaning of section 488, clause 4 of the Code of Criminal Procedure, and will not justify a Magistrate in refusing maintenance. "Living in adultery" refers to a course of conduct and means something more than a single lapse from virtue. *Kallu* v. *Kaunsilia*, (I.L.R., 26 All., 326), followed.

Patala Atchamma v. *Patala Mahalakshmi* 332

18. ——————————————, s. 526—*Transfer of criminal case—Magistrate having prejudged accused in other case, sufficient ground for transfer :*

Where the Magistrate has, in a counter case brought by the accused on the same facts, prejudged the guilt of the accused, the High Court will, in the interest of justice, transfer the case against the accused to some other Court.

Rangasami Goundan v. *Emperor* 233

19. ——————————————, s. 531—*Section applies to cases where Magistrate tries in respect of offences committed outside his jurisdiction :*

There is nothing in the language of section 531 of the Code of Criminal Procedure to confine its operation to cases where offences committed within the jurisdiction of a Court are tried by such Court outside the limits of the local area of its jurisdiction. A finding, sentence or order regularly passed by a Court in the case of an offence committed outside its local area cannot be set aside when no failure of justice has taken place.

Emperor v. *Doraiswamy Mudali* 94

DARKHAST RULE 14—*Jurisdiction of Civil Courts—Registry under rule* 14 *only conditional—Civil Courts can interfere only when public servant acts outside his authority :*

Under rule 14 of the Darkhast rules, the registry by the Tahsildar and the original grant are subject to the result of any appeal that might be admitted by the Deputy Collector. Civil Courts have no jurisdiction to question the validity of acts done by Government officers when they act within the scope of their authority. The propriety of a decision by a darkhast authority, original or appellate, acting within the scope of its powers cannot be a subject of investigation by the Civil Courts.

Muthuveera Vandayan v. *The Secretary of State for India* 270

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DEFAMATION—*No prosecution lies for, in respect of answers given by a party to questions asked by Court:*

It is contrary to public policy that a person bound to state the truth in answer to questions put to him by a Court should be liable to be prosecuted for defamation in respect of answers so given, though untrue and not given in good faith. *Manjaya* v. *Sesha Shetti*, (I.L.R., 11 Mad., 477), followed.

In the matter of "Alraja Naidu" 222

DISTRICT MUNICIPALITIES ACT (MADRAS) IV OF 1884, AS AMENDED BY ACT III OF 1897, ss. 10, 10-A, 19, 250—*Rules 6, 34, 35 and 36 of rules framed by Government under s. 250—Election of Councillor invalid under rule 6 if defect existed before election although opinion of Governor in Council expressed after—Finality of the Collector's order under rule 36—Powers of Government under rule 34 exist unless order is passed by the Collector under rules 35 and 36—Rules 35 and 36 apply only when petition presented to Collector—Rules 34, 35 and 36 not* ultra vires:

Under section 10-A of the Madras District Municipalities Act and rule 6 of the rules framed under section 250, a person is disqualified from being appointed or elected a Councillor if, before his election, he is convicted of an offence, which, in the opinion of the Governor in Council, disqualifies him from being a Councillor, even though such opinion of the Governor in Council is arrived at after the election. The refusal by the Governor in Council to remove a Councillor under section 19 for such a conviction is no bar when such Councillor is subsequently re-elected, to the invalidation of the election on the ground of such conviction. Rules 34, 35 and 36 are not *ultra vires*. The rules were validly made in exercise of the powers conferred by section 250 (1); and even if not so, the power to prescribe conditions conferred by section 10, empowers the Governor in Council to make such rules. Rules 35 and 36 prescribe the procedure to be followed when a petition contesting the election is presented. The word 'then' in rule 35 means 'after such petition is presented to the Collector' and not 'after the Governor in Council has taken action under rule 34.' The Governor in Council taking action under rule 34 is not confined to putting the Collector in motion under rule 35, but can pass orders himself. Such power is not taken away by the powers conferred on the Collector under rules 35 and 36, but only by an order of the Collector duly passed under those rules on a petition presented to him. The Governor in Council may take action under rule 34, whether a petition has been presented to the Collector or not. The fact that the Governor in Council may, under such circumstances by notification, remove the Councillor under section 19 of the Act, does not affect the validity of such rule, which enables him to invalidate the election without a notification. *Per* WALLIS, J.—Rules 35 and 36 do not warrant the validity of an election being questioned on the ground that the person elected was likely to bring the municipal administration into contempt without such enquiry as is provided by the rules; and the pronouncement of such disqualification by the Governor in Council under rule 34 without such inquiry cannot be supported.

Secretary of State for India v. *Venkatesalu Naidu* 113

2. ——————————————, **s. 45**—*Agreement not in accordance with section not binding on Municipality even though partly acted upon:*

An agreement falling within the scope of section 45 of the District Municipalities Act, is invalid if the provisions of the section have not been complied with and is not binding on either of the parties to it. The fact that such an agreement was partially acted upon, cannot render it an operative contract. *Ahmedabad Municipality* v. *Sulemanji*, (I.L.R., 27 Bom., 618), followed.

Raman Chetti v. *The Municipal Council of Kumbakonam* 290

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3. ———————————, ss. 47, 66 (1)—*Tax on houses, a yearly tax—When ownership arises after assessment, such owner liable for whole tax and not only for instalments accruing due after acquisition of ownership:*

The provisions of section 66 (1) and other sections of the Madras District Municipalities Act, show that the tax imposed on houses under section 47 of the Act is a *yearly* tax, although for the sake of convenience it may be made payable in instalments. A person becoming the owner of a house subsequent to such assessment becomes liable as owner for the whole yearly tax and not only for the instalments that accrue due after his acquisition of ownership. It is not compulsory on the municipality to apportion the tax among the several owners during the period and the provisions of the Transfer of Property Act regarding the obligations of buyer and seller in respect of the payment of taxes do not apply as between the Municipality and the subsequent owner.

The Chairman of the Municipal Council, Nellore v. *Dwarapally Kottamma* ... 423

4. ———————————, s. 188 (n)—*Not necessary to constitute offence that the cattle should have been kept for purposes of trade—No offence if cattle not habitually kept:*

An offence under section 188 (*n*) of Madras Act IV of 1884 is committed when a person keeps more than 10 head of cattle in a private place, though not for purposes of trade. It is necessary, however, that there must be regular user of the place for keeping more than 10 head of cattle; and a mere temporary user for such purpose will not constitute the offence.

Emperor v. *Mayandi Konan*... 220

5. ———————————, s. 222—*Section applies to lines having no side drains or ditches:*

The obligation imposed on house-owners by section 222 of the District Municipalities Act, of not letting dirty water pass into the street is not conditional on the existence of drains made by the municipality. The hardship which may be inflicted on house-owners where the municipality has provided no drains is a matter to be considered in graduating the penalty.

Emperor v. *Nagan Chetty* 221

DOCUMENT, CONSTRUCTION OF:—*See* "MALABAR LAW."

EVIDENCE ACT I OF 1872, s. 68—*Attesting witness, if available, must be called to prove a mortgage bond even if object is only to enforce the personal covenant:*

Where one of the witnesses who have attested a mortgage bond is available, the execution of such bond cannot, under section 68 of the Evidence Act, be proved otherwise than by the evidence of such witness, even when the object of proving such execution has reference only to a personal covenant to pay, which is severable from the security created by the bond.

Veerappa Kavundan v. *Ramasami Kavundan* 251

2. ———————————, ss. 91, 95, 97—*Where sale deed gives wrong survey numbers to the lands sold, evidence admissible to show the real lands intended to be sold:*

The general rule laid down in section 91 of the Evidence Act is subject to the exceptions laid down in sections 95 and 97 of the same Act. Where a sale deed describes the land sold by wrong survey numbers, extrinsic evidence is admissible to show that the lands intended to be sold and actually sold and delivered were lands bearing different survey numbers.

Karuppa Goundan v. *Periathambi Goundan* 397

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8. ——————————, s. 92, prov. 4—*Subsequent oral agreement to discharge prior registered agreement not receivable, but actual discharge may be proved :*

A agreed by registered deed to give B for her life an annual amount by way of maintenance, and subsequently it was agreed orally that B should enjoy certain lands in lieu of such maintenance and B was put in possession. In a suit by B to recover arrears of maintenance from A :—*Held*, that the subsequent oral agreement was an agreement to rescind or modify the original registered agreement and was not receivable in evidence under proviso 4 to section 92 of the Evidence Act : *Held further*, that it was open to the defendant to prove that the arrears claimed were actually discharged by the plaintiff taking possession, although the agreement to discharge cannot be proved.

Kattika Bapanamma v. *Kattika Kristnamma* 231

FIDUCIARY RELATION—*Parent and child transaction between—Undue influence—Parent and even strangers claiming benefit bound to show that the child was a free agent and had independent advice—Delay and acquiescence, when a bar to equitable relief—Limitation Act XV of 1877, sched. II, art. 91—Does not apply to defences :*

A parent stands in a fiduciary relation towards his child; and any transaction between them by which any benefit is procured by the parent to himself or to a third party at the expense of the child will be viewed with jealousy by Courts of Equity and the burden will lie on the parent or third party claiming the benefit of showing that the child in entering into the transaction had the independent advice of persons who acted in his interests, that he thoroughly understood the nature of the transaction, and that he was removed from all undue influence when the gift was made. *Huguenin* v. *Baseley*, (14 Ves., 299), referred to. *Allcard* v. *Skinner*, (36 Ch.D., 145 at pp. 181, 182), referred to. Delay and acquiescence will not bar the defendant's right to equitable relief unless he knew that he had the right or being a free agent at the time, he deliberately determined not to inquire what his rights were or to act upon them. Where beyond signing the deed the defendant does not do anything to show that he considered the deed effectual he will not be barred by mere lapse of time from setting up the invalidity of the deed. Article 91 of schedule II of the Limitation Act applies only to suits by plaintiffs to have instruments avoided. A defendant may, by way of equitable defence, set up the invalidity of a deed, although his right to have it avoided by a suit has become time-barred. *Jugaldas* v. *Ambashankar*, (I.L.R., 12 Bom., 501), distinguished. *Ranganath Sakharam* v. *Govind Narasinv*, (I.L.R., 20 Bom., 639), referred to and followed.

Lakshmi Doss v. *Roop Laul* 196

FOREIGN COURT, JUDGMENT OF—*Where party has submitted to jurisdiction, irregularities not affecting jurisdiction of the Court do not vitiate the judgment :*

A party who has submitted to the jurisdiction of a foreign Court is bound by its judgment, when such judgment is within jurisdiction and does not offend the principles of natural justice. Irregularities which do not affect the jurisdiction of the Court do not vitiate such judgment even when they are such as will, in the view of the foreign Court, render the judgment there a nullity. The judgment cannot be impeached on grounds which could have been, but were not, taken in the foreign Court. *Pemberton* v. *Hughes*, (L.R., [1899] 1 Ch., 781), referred to.

Gudaru Kristnayya Naidu v. *Maradugula Venkataratnam* 292

FRAUDULENT TRANSFER OF MOVEABLES—13 Elizabeth, c. 5, and the Transfer of Property Act IV of 1882, s. 53—*Transfer, though for valuable consideration void if made to defeat creditors—Such transfer not valid even in part :*

Section 53 of the Transfer of Property Act does not apply to transfers of moveable property. A transfer of moveable property by a debtor is valid as against his creditors only when it is made *bonâ fide* and for valuable consideration. Where a transfer, though in part for valuable

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consideration, is, as regards the other part, only an arrangement to defeat creditors it is wholly void against the creditors both under section 53 of the Transfer of Property Act and under 13 Elizabeth, c. 5, and cannot be upheld to the extent to which it is supported by consideration. There is nothing in the statute of Elizabeth or in section 23 of the Transfer of Property Act to prevent a debtor giving preference to a creditor if nothing is done to affect the other creditors injuriously. Twyne's Case, (3 Co. Rep., 80), referred to and followed. *Ramasamia Pillai* v. *Adinarayana Pillai*, (I.L.R., 20 Mad., 465), distinguished.

Chidambaram Chettiar v. *Sami Aiyar* 6

GANJAM AND VIZAGAPATAM AGENCY RULES, ACT XXIV OF 1839, RULE 20—*High Court may interfere when Agent decides wrongly on question of limitation—Limitation Act XV of* 1877, *sched. II, art.* 14, *does not apply when Act complained of is a nullity :*

An erroneous decision by an Agent acting under the Ganjam and Vizagapatam Agency rules, on a question of limitation is a 'special ground' which will authorise an interference by the High Court under Rule 20 of such rules. Article 14, schedule II of the Limitation Act, does not apply to an act done by a Government officer, when such act purports to be done in pursuance of an order, but is, in fact, owing to a mistake, not so done. Such an act is a nullity which need not be set aside.

Maharaja of Vizianagaram v. *Satrucherla Somasekara Raju* 280

HEREDITARY VILLAGE OFFICES ACT (MADRAS)—ACT III OF 1895, ss. 13, 21—*Section* 21 *applies to cases where defendant denies that lands claimed by plaintiff are emoluments :*

The jurisdiction of Civil Courts is excluded by section 21 of the Madras Hereditary Village Offices Act in cases in which the plaintiff sues for lands as emoluments of his office and the defendant resists the claim on the ground that the land is not the emolument of the office. Such a suit is not the less a suit for emoluments within the meaning of the section because the defendant resists the claim on such ground. *Ravuthu Kounden* v. *Muthu Kounden*, (I.L.R., 13 Mad., 41), distinguished.

Kesiram Narasimhalu v. *Narasimhulu Patnaidu* 126

HINDU ENDOWMENT—*Scheme for management of Hindu temple by Mahant—Power to make and modify such a scheme—Power to alter trust of endowment—Civil Procedure Code (Act XIV of* 1882), *s.* 539—*Provision for application of surplus funds :*

This was a suit in which the respondent charged the appellant, the manager of a certain Hindu temple, with neglect to keep proper accounts, misappropriation of offerings and other acts of a similar character, and the relief prayed was the settling of a scheme for the management of the temple including "provisions for the application of the surplus funds belonging to the temple with such modifications of the managing authority" as might be necessary to obviate the evils referred to, "and place the administration of the temple on a satisfactory footing." Objections were taken to the scheme settled by the High Court (which amended one framed by the District Court) that its effect would be to lower the position of the Mahant and weaken his authority, and that it provided for the application of surplus funds by devoting them to objects foreign to the purposes of the endowment. The Judicial Committee settled a scheme calculated to get rid of those objections and to meet the exigencies of the case without impairing the authority of the Mahant whose position, subject to the scheme, was to be the same as before, and providing that all surplus income should be invested for the benefit of the temple, with liberty to the Mahant or any person interested to apply to the District Court with reference to the carrying out the directions of the scheme, or to the High Court for any modification of it which might appear to be necessary or convenient.

Prayag Doss Ji Varu v. *Tirumala Srirangacharla Varu* 138

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HINDU LAW:—*See* "PRESCRIPTION."

2. ———*Adoption—Adoption with consent of sapindas—Assent given on the strength of representation by widow that she had her husband's authority to adopt—Such authority found on evidence not to have been proved—Omission to ask consent of one of two of husband's nearest kinsmen, effect of:*

The first appellant was the widow of a deceased Brahman who was separate in estate from his kinsmen two of whom were the respondents who were brothers of the deceased, and also divided between themselves. The widow, representing that she had the oral authority of her husband to adopt a son, obtained the assent of the second respondent, the elder of the two brothers, who executed a deed purporting to ratify the husband's authority, and this was signed also by some remoter kinsmen of the husband; and the widow thereupon purported to adopt the second appellant as a son to her husband. The first respondent was not asked for his consent, the widow, alleging, as her reason for omitting to ask him, that she knew from his attitude towards the proposed adoption that he would refuse. In a suit brought by the first respondent to have the adoption declared void, both the lower Courts found that there was not sufficient evidence to prove that the widow had any authority from her husband:—*Held*, by the Judicial Committee (upholding the judgment of the High Court) that the adoption was not made with the independent approval of the natural advisers of the widow, the assent of the kinsmen who were asked having been given not in the exercise of an independent judgment on the expediency of the proposed adoption, but as a ratification of the husband's authority which did not exist; and the appellants could not now set up such ratification as an independent ground of defence. Nor had the widow justified her omission to ask for the authority of the first respondent, one of the nearest kinsmen of her husband, and holding an important position in the family. To consult him was essential to her obtaining the mind of the kinsmen on the adoption, and her reason for not consulting him was one which she was not entitled to give. Her case therefore failed in the quality of the consents actually obtained, and the adoption was not valid.

Jonalagadda Venkamma v. *Jonalagadda Subramaniam* 50

3. ———*Adoption—When sapinda consents on condition that adopted son should not claim the property of his adoptive father, adoption not thereby invalid:*

When a sapinda in giving his consent to an adoption, protects himself from loss by stipulating that the adopted son should not claim a share in the joint family property in the enjoyment of such sapinda, the consent of the sapinda is not given from corrupt or improper motives and the adoption will be good. *Rami Reddi* v. *Rengamma*, (11 M.L.J., 29), distinguished.

Srinivasa Aiyangar v. *Rangasami Ayyangar* 450

4. ———*Charitable bequest—Bequest to 'Dharma' void:*

One *G* by his last will and testament bequeathed certain properties to his daughter in the following words:—"They (the executors) shall deliver all other properties to her on her attaining proper age (*i.e.*) 18 years: my daughter shall use and enjoy the properties for her life. These properties shall, after her, be taken by her issue. In case my daughter may not per chance have any such issue, she should dispose of as she pleases all the properties she may have. *In case she, per chance, being short lived die before so attaining her age, the executors shall utilise those properties for Dharmam.*" The daughter died issueless before attaining majority. The plaintiff one of the executors and the next heir of the deceased *G* brought this suit for declaring the bequest to 'Dharma' void and to declare the right of plaintiff to succeed to the properties bequeathed to the daughter. Mr. Justice Boddam held the bequest to 'Dharmam' void and decreed the plaintiff's claim. On appeal, *held*: *Per* CHIEF JUSTICE.—The bequest to 'Dharmam' is void. *Runchordas Vandrawondas* v. *Parvatibhai*, (L.R., 26 I.A., 71), followed. *Per* SUBRAMANIA AYYAR, J.—The word 'Dharmam'

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when used in connection with gifts of property by a Hindu has a perfectly well-settled meaning and connotes *ishta* and poorta donations. The word is a compendious term referring to certain classes of pious gifts, and is not a mere vague and uncertain expression. The testator must be presumed to have used the word with reference to the definite objects inculcated by shastraic precepts and well known to the people and therefore the gift to 'Dharmam' is not void for indefiniteness.

Parthasarathy Pillai v. *Thiruvengada Pillai* 340

5. ————*Gift to widow, construction of:*

A and *B* brought a suit against *C* for division of what *A* and *B* alleged to be joint family property and *C* alleged to be his divided property. *A* died and *V* his widow was brought on the record as his representative. *V* and *B* withdrew from the suit on *C* giving them jointly some lands under a deed, which recited that *C* gave the lands as a matter of favour at the request of *V* and *B* to be enjoyed by *V* and *B* in equal portions with the right of gift, sale, etc. *V* devised her share to *D*. In a suit by *B* to recover the lands from *D*, *held*: *Per* MILLER, J.—There was nothing in the circumstances of the case to raise any presumption based on the sex of *V* that the gift to *V* was one for life only, in the face of the express words of the deed which purport to convey an absolute estate: *Per* WALLIS, J.—In construing such documents, the situation of the parties and their rights at the time must be taken into consideration. There is nothing in the circumstances or the document to show that *C* intended to enlarge the widow's interest in the property given her to full ownership. The words 'you shall enjoy the said lands with the rights of gift, sale, etc.,' do not necessarily indicate such an intention. *V* therefore took only a widow's estate in the properties given by the deed. *Dinonath Mukerji* v. *Gopal Churn Mukerji*, (8 C.L.R., 57), referred to and *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick*, (6 M.I.A.), referred to.

Sambasiva Ayyar v. *Visvam Ayyar* 356

6. ————*Maintenance, decree for—When such decree can be executed after death of person against whom it is passed against other members of joint family:*

A decree for maintenance obtained against a member of an undivided family, can, after his death, be executed against joint property in the hands of other members, if the member against whom the decree was passed, was sued as representing the family, or, if the decree created a charge on the joint family property. *Muttia* v. *Virrammal*, (I.L.R., 10 Mad., 283), referred to.

Subbanna Bhatta v. *Subbanna* 324

7. ————*Mitakshara—Succession of Bandhus—Daughter's son's son entitled to preference over daughter's daughter's son—Variance between pleading and proof:*

A plaintiff who sues on and fails to prove an alleged gift, may rely on his title by inheritance. Under the Mitakshara Law among persons claiming to succeed as Bandhus, preference may be extended so as to prefer, all other considerations being equal, that claimant between whom and the stem there intervines one female link to that claimant who is separated from the stem by two such links. A daughter's son's son will have preference over a daughter's daughter's son.

Tirumalachariar v. *Andal Ammal* 406

8. ————*Mitakshara Gift—Gift of considerable portion of moveable or immoveable joint family property invalid—Acquiescence:*

An undivided member of a Hindu family governed by the Mitakshara Law, has no power to alienate any considerable portion of the moveable or immoveable properties belonging to the joint family by way of gift to the female members of the family. When the portion so alienated is not severed from the family property, but the income alone is given to the donees, the objecting co-parcener is not barred by acquiescence from

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questioning the alienation merely because he did not object to the payment of such income. *Bachoo Harkisondas* v. *Minkorebai*, (I.L.R., 29 Bom., 51), distinguished. *Ramasawmy Ayyar* v. *Vengidusami Ayyar*, (I.L.R., 22 Mad., 113), distinguished.

Kamaksh Ammal v. *Chakrapany Chettiar* 452

9. ——————**REVERSIONERS**—*Agreement to divide reversion when it should fall in, creates no vested right, but only right to claim specific performance :*

Three brothers, *S*, *R* and *K* and their father made an arrangement which amounted to a division of the family properties. The father and *R* and *K* continued, however, to live together. The father died first and then *R*, leaving him surviving *A* his widow and *B* his daughter. *A* and *B* did not claim *R's* share, but were content with maintenance. There was, however, no surrender by *A* of her rights. *S* and *K* entered into an agreement between themselves to the effect that *K* should enjoy *R's* share and maintain *A* and *B*, *S* being given a small piece of land at once and that after *A's* death, *S* was to take half of *R's* share. *B* died unmarried in *A's* life-time and *S* predeceased *A* who died in 1891. In a suit brought in 1901 by the son of *S* to recover one-half share of *R's* property :—*Held* (WALLIS, J., dissenting) that *K* and *S* were expectant reversionary heirs and the agreement between them was in effect to divide the reversion when it should fall in. The right of *K* as such presumptive reversionary heir was incapable of transfer on the principle embodied in section 6 of the Transfer of Property Act, and the agreement did not operate to vest any property in *S* as from the date of agreement and the suit was not therefore maintainable. *Per* BODDAM, J.—The agreement gave only a right to claim specific performance thereof when the reversion should fall in, which right became barred as it was not enforced within the statutory period after the death of the widow. *Per* WALLIS, J.—The widow not having claimed her husband's share and having contented herself with maintenance, *S* and *K* were not in the position of expectant heirs, although the widow by asserting her right might have reduced them to that position. Under the circumstances the agreement was something more than a mere contract in the part of *K* to convey to *S* a half share on the widow's death. The effect of the agreement was to give *S* a vested interest in a half share in the lands to take effect in possession on the widow's death and the suit was therefore maintainable.

Pindiprolu Sooraparaju v. *Pindiprolu Veerabhadrudu* 486

10. ——————*Reversioner bound by decree obtained against widow without fraud or collusion, though without contest—Alienation by one of several widows not invalid* ipso facto *:*

A decree on a claim binding on the inheritance though obtained without contest against the widow in possession in binding on the reversionary heir in the absence of fraud or collusion. The widow as representing the estate is not bound to raise any defence when she is satisfied that the debt is really due. An alienation by one of two co-widows is not *ipso facto* invalid with reference to the interest of the other co-widow or of persons interested in the reversion.

Subbammal v. *Avudaiyammal* 2

11. ——————*Right of representation—Divided son as nearest sapinda does not exclude divided grandson or great grandson :*

Partition does not annul the filial relation nor the right of succession incidental to such relation. The right of divided sons, grandsons, and great grandsons of the last male owner to succeed to his divided property, is the same as in the case of undivided family property. The right of representation exists equally in the former as in the latter case, and the divided son will not, on the principle of the exclusion of remoter by nearer sapindas, exclude the divided grandson in the succession to divided property of the ancestor. *Ramappa Naicken* v. *Sithammal*, (I.L.R., 2 Mad., 184), referred to. *Muthuvaduganatha Tevar* v. *Periasami*, (I.L.R., 16 Mad., 15), referred to.

Marudayi v. *Doraisami Karambian* 346

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12. ——————WILLS—*Will of self-acquired property of Hindu testator not revoked by birth of posthumous son—Hindu Wills Act, Act XXI of* 1870, *ss.* 2 *and* 3—*Indian Succession Act, Act X of* 1865, *ss.* 56 *and* 57—*Under ss.* 2 *and* 3 *of the Hindu Wills Act and s.* 57 *of the Indian Succession Act, a will to which the Hindu Wills Act applies can be revoked only in the modes provided in s.* 57 *of the Succession Act:*

The incorporation of section 57 of the Indian Succession Act in the Hindu Wills Act and the enactment of the provision of section 3 of the latter Act show clearly that the Legislature intended that the rule of revocation by a change of circumstances should not be applied to the wills of Hindus section 57 of the Succession Act is exhaustive, as it provides that a will shall not be revoked except in certain ways. Wills of Hindus to which the Hindu Wills Act applies, can be revoked only in one of the modes, excepting marriage, provided in section 57 of the Succession Act. A will by a Hindu of self-acquired property to which the provisions of the Hindu Wills Act apply, is not therefore revoked by the birth of a posthumous son. The same rule must be applied in the case of wills not governed by the Hindu Wills Act, as to apply a different rule to them will be inconvenient as well as illogical.

Subba Reddi v. *Doraisami Bathen* 369

HINDU WILLS ACT, ss. 2 and 3;—*See* "HINDU LAW, WILL."

HUSBAND AND WIFE—*Implied authority of wife to pledge husband's credit when rebutted:*

The presumption of implied authority on the part of the wife to pledge her husband's credit for necessaries may be rebutted by proof of circumstances inconsistent with the existence of such authority.

Mahomed Sultan Sahib v. *Horace Robinson* 543

INAM—*Madras Enfranchised Inams Act, Act IV of* 1866—*Service inam enfranchised in widow's name under Act IV of* 1866 *not alienable by widow beyond her own life-time:*

The enfranchisement of a service inam does not involve a resumption by Government and a fresh grant in favour of the persons named in the title-deed. It disannexes the inam from the office, converts it into ordinary property and releases the reversionary rights of the Crown in the inam, but does not confer on the persons named in the title-deed any right in derogation of those possessed by other persons in the inam at the time of the enfranchisement. Case law considered. *Narayana* v. *Chengalamma*, (I.L.R., 10 Mad., 1), approved. *Gunnaiyan* v. *Kamakchi Ayyar*, (I.L.R., 26 Mad., 339), approved. A Hindu widow cannot alienate beyond her own life-time service inam enfranchised in her name under Madras Act IV of 1866.

Pingala Lakshmipathi v. *Bommireddipalli Chalamayya* 434

INDIAN COMPANIES ACT—ACT VI OF 1882, s. 136—*Execution of decree against company in liquidation not to be prevented without making due provision for the right of judgment-creditor—Judgment-creditor attaching decree against company must be allowed to prove in the name of the decree-holder in liquidation:*

It will not be equitable for Courts to prevent judgment-creditors under section 136 of the Companies Act, from executing decrees against a company in liquidation without seeing that such judgment-creditor's rights are respected in liquidation. *Klanber* v. *Weill*, (17 Times, L.R., 344), referred to. Where *A* in execution of a decree against *B* attaches under section 273 of the Code of Civil Procedure, a decree which *B* holds against a company in liquidation, the Court will direct the liquidator to recognise *A* as the representative of *B* and allow him to prove for the decree debt in the name of *B*, and to receive and apply dividends payable to *B* in satisfaction of *A's* judgment debt subject to the rights of other attaching creditors to rateable distribution.

Sesha Ayyar v. *The Tinnevelly Sarangapany Sugar Mill Company (Limited)* ... 533

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2. ————————————————————, ss. 169, 177, 185, 189, 191—*Order refusing supervision order under section* 191 *appealable under section* 169—*Liquidator—Duties of—Where liquidators appointed under s.* 185, *misbehave, supervision order must be made by Court on the motion of creditors :*

The right of appeal conferred by section 169 of the Indian Companies Act extends to all orders or decisions made or given in the matter of the winding up of a company whether the winding up be compulsory, voluntary, or under supervision. An order refusing to make a supervision order under section 191 is appealable under section 169. The duties imposed upon liquidators by section 177 of the Act cannot be delegated by them to others. Liquidators appointed by the company under section 177 can be removed only by the Court under section 185 and are not subject to the control of the company in the performance of their duties. Where the liquidators on insufficient grounds refuse to deal with the claim of a creditor on its legal merits, the Court is bound to grant a supervision order on the application of such creditor.

Kesavaloo Naidu v. *Murugappa Mudali* 22

INDIAN RAILWAYS ACT, IX OF 1890, s. 67—*Benefit of section not waived by Railway Company when the grant reserved accommodation under the rules :*

The provision in section 67 of the Indian Railways Act that 'fares shall be deemed to be accepted and tickets deemed to be issued subject to the condition of there being room available in the train for which the tickets are issued' is introduced for the benefit of Railway Companies and can be waived by them. One of the rules under which reserved accommodation is granted is, 'Reserved carriages in mail trains can be provided when the load of the train permits.' In granting reserved accommodation on the terms embodied in the rules, the company does not contract itself out of the benefit conferred by section 67, and is not liable in damages for refusing to attach a reserved carriage to a mail train already fully loaded.

Kommireddy Surayanarayanamurty v. *The Madras Railway Company* ... 417

JURISDICTION :—*See* "CIVIL PROCEDURE CODE, s. 646-B."

2. ——————*See* "COURT FEES ACT, s. 7, CL. 4 (c)."

3. ——————*See* "CRIMINAL PROCEDURE CODE, ss. 408, 435."

4. —————— **Award of costs by Court trying suit without**—*Such award not a nullity—Civil Procedure Code—Act XIV of* 1882, *s.* 646*B :*

A Court of First Instance having no jurisdiction, tried and decided a suit passing a decree in favour of the plantiff with costs. On appeal the decree was reversed on the merits and the suit was dismissed with costs of both Courts. All the parties and both the Courts had proceeded on the assumption that the lower Court had jurisdiction:—*Held*, that the award of costs by the Appellate Court was not a nullity and such amount was recoverable. Section 646B of the Code of Civil Procedure is an enabling section and does not cut down the jurisdiction of the appellate tribunal.

Sri Raja Simhadri Appa Rao v. *Chelasane Bhadrayya* 41

5. ——————*Removal or alteration of religious marks is an interference with property of which Civil Courts can take cognisance—Injunction against trustees of temples—No injunction to restrain an act which although an innovation does not interfere with worship :*

Removal or alteration of namams or religious marks in a temple amounts to an interference with property and will be a ground for action in the Civil Courts. The trustees of a temple may be restrained by injunction from making unjustifiable changes which would affect the character of the temple as a religious institution. Where, in a temple in which two rival sects following rival gurus have interest and worship, the trustee introduces a new metal idol, in addition to the existing stone idol of one of the rival

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gurus, such introduction when not effected at the expense of the temple and when it does not interfere with the worship of the rival sect, is not inconsistent with the usage of the institution and ought not to be restrained by an injunction.

Krishnasami Ayyangar v. *Samaram Singrachariar* 158

6. ——————*Subject-matter of suit of mixed spiritual and temporal character—If the two intimately connected, a Court can enquire into the spiritual matter—Right to bury dead is a civil right:*

Although Courts in this country have no jurisdiction in suits relating to ritual or religious observance only the Courts are bound to inquire into questions of religion of ritual which are material for the determination of civil disputes; and when the matter in dispute is of a mixed spiritual and temporal nature, jurisdiction to inquire into the spiritual question will depend upon whether it is so intimately connected with the temporal as to be inseparable from it. The right of burial is a civil right: and an interference with the right of reciting prayers in connection with such burial is an invasion of the civil right. *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya*, (I.L.R., 7 Bom., 323), referred to. *Ram Rao* v. *Rustumkhan*, (I.L.R., 26 Bom., 198), referred to.

Kooni Meera Sahib v. *Mahomed Meera Sahib* 15

7. ——————*Valuation of suit—Suit by unsuccessful claimant under s.* 283 *of the Code of Civil Procedure to obtain the declaration rendered necessary by the order allowing attachment, when there is no distinct claim against judgment-debtor for declaration of title, to be valued at the amount for which attachment is made and not at the value of the property—Judgment-debtor not party, merely as such, to claim proceedings in the eye of law:*

A claim to attached property under section 278 of the Code of Civil Procedure being dismissed, the unsuccessful claimant sued for a declaration that the property was not liable to attachment as the property of the judgment-debtor. The judgment-debtor was made a party but no distinct claim was made against him. The value of the attached property was Rs. 2,775, while the amount for which attachment took place was only Rs. 1,700:—*Held*, that such a suit was not a suit to obtain a declaration of title to the property, but one for getting rid of the effect of the order disallowing the claim and ought to be valued at the amount for which the property was attached when such amount is less than the value of the property. *Dwarka Das* v. *Kameshar Prasad*, (I.L.R., 17 All., 69), distinguished. A judgment-debtor who is not in fact a party to the claim proceedings does not in the eye of law become such by reason solely of his being the judgment-debtor. *Moidin Kutti* v. *Kunhi Kutti Ali*, (I.L.R., 25 Mad., 721), followed.

Krishnasami Naidu v. *Somasundaram Chettiar* 335

8. ——————OF CIVIL COURTS—*Order of Magistrate for maintenance under s.* 488 *of the Code of Criminal Procedure does not oust the jurisdiction of Civil Courts—No injunction to restrain proceedings on order under s.* 488:

The first defendant obtained an order for maintenance under section 488 of the Code of Criminal Procedure against plaintiff. In a suit brought by plaintiff subsequently against the first defendant and her minor son, the second defendant, for a declaration that the defendants had no right to a share in or maintenance out of his properties:—*Held*, (1) that the suit was not one to set aside the Magistrate's order for maintenance and was sustainable. The Magistrate's order did not take away the jurisdiction of the Civil Courts. (2) No suit will lie for an injunction to restrain proceedings under an order made by a Magistrate under section 488 of the Code of Criminal Procedure. *Veeran* v. *Ayyammah*, (2 Weir, 615), approved. *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba*, (I.L.R., 14 Calc., 276), followed. *Subhudra* v. *Basdeo Dube*, (I.L.R., 18 All., 29), explained.

Deraje Malinga Naika v. *Marati Kaveri* 400

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LAND ACQUISITION ACT I OF 1894, ss. 3 (a), 23 (2)—*When land is acquired with trees on it, the 15 per cent. ought to be calculated on the value of both:*

Trees are 'things attached to the earth' and are thus included in the definition of land in section 3 (a) of the Land Acquisition Act; and this definition must be applied in the construction of section 23 of the Act. The value of such trees as are on the land when the declaration is made under section 6 is included in the market value of the land on which the allowance of 15 per cent. is to be calculated under section 23 (2) of the Land Acquisition Act.

Sub-Collector of Godavari v. *Seragam Subbaroyadu* 151

LANDLORD AND TENANT—*Occupancy right, nature of—Ryot with occupancy right has no right to cut fruit trees.*

Ryots with rights of occupancy possess in their lands a heritable and alienable interest of a permanent character, but not the sole interest. The landlord is interested in maintaining the saleability of the holding, and, in protecting such interest, he is entitled to restrain the ryot from cutting fruit-bearing trees. *Rangayya Appa Row* v. *Kadiyala Rathnam*, (I.L.R., 13 Mad., 249), followed.

Bodda Goddeppa v. *The Maharaja of Vizianagaram* 155

2. ——————*Inamdar, tenant under—No presumption that tenant has permanent occupancy right:*

The position of inamdars differs materially from that of zamindars and the presumption that persons becoming tenants of zamindars after the permanent settlement become occupancy tenants does not apply to persons who become tenants under inamdars. *Cheekati Zamindar* v. *Ranasoori Dhora*, (I.L.R., 23 Mad., 318), referred to.

Marapu Tharalu v. *Telukula Neelakanta Behara* 502

3. ——————*South Canara, tenant in—No presumption that tenancy is chalgeni or mulgeni—Immemorial possession on uniform rent, presumptive evidence of mulgeni:*

There is no presumption in South Canara that a tenancy is either *chalgeni* or *mulgeni*. Immemorial possession on a uniform rent will raise a presumption in favour of mulgeni tenure and the burden will be on the other party to prove that the tenant was holding on chalgeni tenure. *Boggu Shetti* v. *Baghurama Naik*, (Second Appeals Nos. 187 and 192 of 1879), referred to.

Kittu Hegadthi v. *Channamma Shettathi* 528

4. ——————*When patta once tendered and accepted, landlord cannot tender a second patta and enforce the terms of such second patta:*

When a patta has been tendered by the landlord and the tenant accepting such patta has executed a muchilika, the result is an agreement binding on the parties for the period to which the instruments relate, so long as they are in force; and the landlord cannot during such period tender a second patta and proceed for the rent claimed to be due under such second patta. *Krishna Doss Bala Mukanda Doss* v. *Guruva Reddi*, (9 M.L.J., 183), distinguished. *Arunachellam Chetti* v. *Ganapathi Aiyya*, (I.L.R., 28 Mad., 379), distinguished.

Lakshminarayana Reddi v. *Gurusawmi Udayan* 253

LAND REVENUE ASSESSMENT ACT (MADRAS)—I OF 1876—*'Parties to alienation' who are—means only the parties to the particular alienation in respect of which the application is made:*

The 'parties to an alienation' whose concurrence is necessary for separate registration and sub-division by the Collector under Madras Act I of 1876, are the parties to the particular alienation in respect of which the appli-

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cation is made and not the parties to any transaction which may form a link in the alienor's title. The provisions of the Act are not confined to alienations by the registered proprietor only.

The Collector of Salem v. *Peer Batcha Sahib* 106

LETTERS PATENT, cl. 12—*Considerations of convenience may be taken into account in granting or refusing leave when part of the cause of action arises within jurisdiction—When part of cause of action arises:*

The jurisdiction conferred by clause 12 of the Letters Patent in respect of applications for leave to sue when part of the cause of action arises within jurisdiction ought to be exercised with great caution when the defendant is an absent foreigner. *Societe Generale De Paris* v. *Dreyfus Brothers*, (29 Ch.D., 239 at 243), referred to. Courts in this country are not precluded from taking the question of convenience into consideration in dealing with applications under clause 12 for leave to sue. Part of the cause of action cannot be held to arise at a place, where payment was not originally contracted for merely because after performance of the contract and without any consideration, a promise is made to pay at such place.

Seshagiri Row v. *Nawab Askur Jung Aftal Dowlah Mushral Mulk* 438

2. ——————, cl. 15—'*Judgment*'—*Order shutting out evidence is a judgment and appealable as such:*

An order refusing to issue a commission for the examination of witnesses, whose personal attendance cannot be enforced, affects the right to produce evidence relevant to the issues in the suit and is a judgment within the meaning of clause 15 of the Letters Patent and appealable as such. That the Judge has a discretionary power does not affect the appealability of the order.

Maruthamuthu Pillai v. *Krishnamachariar* 143

3. ——————, cl. 15:—*See* "CRIMINAL POCEDURE CODE, s. 195."

LIMITATION ACT, ACT XV OF 1877, s. 20:—*See* "TRANSFER OF PROPERTY ACT, s. 119."

2. ——————, s. 28, sched. II, art. 44—'*Sale*' *in art.* 44 *not confined to transfer of absolute ownership only—Finding in previous suit of the invalidity of a sale does not dispense with the necessity of suing to set aside such sale:*

The term 'sale' in article 44 of schedule II of the Limitation Act is not confined to an assignment of absolute ownership only but means an assignment for a price of the ward's interest whatever that may be. Article 44 will therefore apply to a suit by the ward to set aside an assignment by his guardian of his right as mortgagee. *Gnanasambhanda Pandara Sannadhi* v. *Velu Pandaram*, (I.L.R., 23 Mad., 279), referred to and followed. A suit by a ward to recover properties improperly alienated by the guardian will be governed by article 44 and the period of limitation will not be that prescribed for a suit for possession of immoveable property. The fact that in a previous suit by the alienee against the ward, to recover some properties which had not passed to his possession under the transfer, the alienation was found invalid will not relieve the ward from the consequences of his failure to have the transfer set aside within the period allowed by law with regard to properties which had passed to the possession of the alienee. When at the time such previous suit was brought, the ward's right to such property had been extinguished under section 28 of the Limitation Act, the decision will not have the effect of reviving the extinguished right. *Lakshmi Doss* v. *Roop Laul*, (I.L.R., 30 Mad., 169), distinguished.

Madugula Latchiah v. *Pally Mukkalinga* 393

3. ——————, art. 1:—*See* "FIDUCIARY RELATION."

4. ——————, art. 12:—*See* "RENT RECOVERY ACT, ss. 38 AND 39."

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5. ———————————, sched. II, art. 14, does not apply when act complained of is a nullity—*Ganjam and Vizagapatam Agency rules, Act XXIV of* 1839, *rule* 20—*High Court may interfere when Agent decides wrongly on question of limitation* :

An erroneous decision by an Agent acting under the Ganjam and Vizagapatam Agency rules, on a question of limitation is a 'special ground' which will authorise an interference by the High Court under Rule 20 of such rules. Article 14, schedule II of the Limitation Act, does not apply to an act done by a Government officer, when such act purports to be done in pursuance of an order, but, in fact, owing to a mistake, is not so done. Such an act is a nullity which need not be set aside.

Maharaja of Vizianagaram v. *Satrucherla Raju* 280

6. ———————————, art. 49—*Cause of action arises when defendant's possession becomes wrongful—Possession by Magistrate is possession for rightful owner* :

Under article 49, schedule II of the Limitation Act, time begins to run from the time when the property is wrongfully taken. Where property is seized by a Magistrate, the property passes into legal custody and such custody is for the benefit of the rightful owner. Time begins to run against such owner only when by an erroneous order of the Magistrate the property is delivered to some other persons and it is so even when such other person had been in wrongful possession previous to the seizure by the Magistrate. *Mudvirapa Kulkarni* v. *Fakirapa Kenardi*, (I.L.R., 7 Bom., 427), distinguished.

Ramaswamy Ayyar v. *Muthusamy Ayyar* 12

7. ———————————, arts. 62, 120—*Article* 62 *applies to suits against benamidar by real owner to recover money received by the former* :

The period of limitation for an action by the real owner against a benamidar to recover money received by the latter for the use of the former is that prescribed in schedule II, article 62 of the Limitation Act. Article 120 does not apply to such a case. *Mahabala Bhatta* v. *Kunhunna Bhatta*, (I.L.R., 21 Mad., 373), followed.

Subbanna Bhatta v. *Kunhanna Banta* 298

8. ———————————, arts. 62, 120—*Suit to recover money received under a transaction which is an absolute nullity governed by art.* 62 *and not* 120 *and cause of action arises on the date of payment* :

A suit by *A* to recover from *B* money which *B* had recovered from a debtor of *A* under colour of a void assignment of such debt by *A* to *B* is an action for money had and received and must be brought within three years of the payment by the debtor to *B* under article 62 of schedule II of the Limitation Act Article 120 does not apply to such a case. *Nund Lall Bose* v. *Meer Aboo Mahomed*, (I.L.R., 5 Calc., 597), dissented from. *Mahomed Wahib* v. *Mahomed Ameer*, (I.L.R., 32 Calc., 532), followed.

Shanmuga Pillai v. *Minor Govindasami* 459

9. ———————————, art. 79, cl. 6—*Decree directing maintenance from date of plaint is a decree within clause* 6—Res judicata—*Erroneous decision on question of law no bar* :

A decree directing payment of future maintenance from the date of plaint, till death of recipient at a certain rate, is a decree for payment on that date in every subsequent year and the period of limitation for the execution of such a decree is that prescribed by article 179 (6) of schedule II of the Limitation Act. An erroneous decision on a question of law in a previous application for execution of such a decree does not operate as a bar in a subsequent application to recover arrears which accrued subsequently. *Kaveri* v. *Venkamma*, (I.L.R., 14 Mad., 396), followed.

Aitamma v. *Naraina Bhatta* 504

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10. ————————————————, art. 91—*Does not apply to defendants in possession—Madras Rent Recovery Act VIII of* 1865, *s.* 18—*Seven days required by the section means seven clear days:*

A defendant in possession is not precluded from setting up the invalidity of a sale, because his right to have it set aside, was barred at the date of suit by article 91 of schedule II to the Limitation Act. The seven days which, in fixing the day of sale under section 18 of the Rent Recovery Act, must be allowed from the time of notice, are seven whole days, and not seven periods of 24 hours calculated from the hour of the day on which the notice was issued. *McQueen* v. *Jackson*, ([1903], 2 K.B., 163), referred to.

Ramanasari v *Muthusawmi Naik* 248

11. ————————————————, arts. 95, 120—*Fraud must be fraud on party to the decree or transaction—Art.* 120 *applies to suits by reversioner for relief against fraudulent decree brought about by widow—cause of action accrues when injury done to reversion—Civil Procedure Code, s.* 244—*Does not apply when decree itself is impugned*—Res judicata:

Fraud within the meaning of article 95 of schedule II of the Indian Limitation Act is fraud practised upon a party to the decree or transaction in which the fraud was committed. *Chunder Nath Chowdhry* v. *Tirthanund Thakoor*, (I.L.R., 3 Calc., 504), followed. Article 95 does not apply to suits by a reversioner impeaching on the ground of fraud against himself transactions of a preceding qualified owner to which he was no party. The period of limitation applicable to such cases is that prescribed by article 120. If the reversioner brings a declaratory suit to set aside the decree or other transaction brought about by the fraud of the qualified owner, the suit must be brought within six years of such decree or transaction. He is not however bound to bring such a suit and it is open to him to wait until the succession falls in and if thereafter anything is done constituting an injury to his vested right, then to pursue his remedy. Where property in the hands of the reversioner is attached in execution of a fraudulent decree against the widow, the injury is the attachment and a suit for redress in respect of such attachment will not be barred under article 120 if brought within six years of the attachment, which is the cause of action. *Parekh Ranchor* v. *Bai Vakhat*, (I.L.R., 11 Bom., 119), not followed. An objection by the reversioner in execution to the attachment on the ground that the decree is not binding on his reversionary right is not triable in execution under section 244 and any adjudication thereon, not being appealable under section 244, will not be binding in subsequent proceedings.

Tallapragada Sundarappa v. *Boorugapalli Sreeramulu* 402

12. ————————————————, arts. 118, 141—*When suit is for possession, art.* 141 *and not art.* 118 *applies:*

Article 119 of schedule II of the Limitation Act applies only to declaratory suits in respect of adoption and not to suits for possession of immoveable property. The period of limitation applicable to the latter class of suits is that prescribed by article 141 of schedule II of the Limitation Act. *Thaukur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Sing*, (L.R., 33 I.A., 156), followed.

Velaga Mangamma v. *Bandlamudi Veerayya* 308

13. ————————————————, art. 127—*Time does not run until sharer excluded—Transfer of Property Act IV of* 1882, *s.* 6 (*a*)—*Hindu Law, reversioner—Renunciation of reversionary right is a transfer of an expectancy and as such is void:*

A, a member of an undivided Hindu family, was adopted by one V, a widow. His adoption was declared invalid in 1883. He consented to reside with V, and in 1896 orally renounced his right to a share in the property belonging to his natural family in consideration of his co-sharers who were also the reversioners of V renouncing the reversionary right in the properties held by V as the heiress of her husband. In a suit brought

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by A in 1901 for partition of the property in his natural family :—*Held*, that A's residing with V from 1883 to 1896 did not amount to an abandonment by A of his right to partition or to an exclusion of A to his knowledge, from the enjoyment of his family property and that his right to partition was not barred by article 127, schedule II of the Limitation Act :—*Held further*, that the renunciation of their reversionary rights by the reversioners amounted to a transfer of an expectancy and was a nullity under section 6 (*a*) of the Transfer of Property Act, and that such renunciation cannot be a good consideration for a contract.

Dhoorjeti Subbayya v. *Dhoorjeti Venkayya* 201

14. ————————————————, arts. 132, 147—*Suit on mortgage bond to enforce payment of amount due by sale of mortgaged property —Suit on mortgage in English form for foreclosure or sale—Transfer of Property Act* (*IV of* 1882), *ss.* 58, 88, 100 *:*

A suit on a simple mortgage bond to enforce payment of the amount due on the bond by sale of the mortgaged property is governed by article 132 of schedule II of the Limitation Act (XV of 1877) and not by article 147. The latter article is limited in its application to the one class of mortgages in which alone the suit can be, and always is, brought for foreclosure or sale, that is to mortgages in the English form.

Vasudeva Mudaliar v. *Srinivasa Pillai* 426

15. ————————————————, art. 149—*Art.* 149 *of schedule II of the Limitation Act, applies only to suits brought by the Secretary of State or on his behalf and not to persons deriving title from him :*

Kuthaperumal Rajali v. *The Secretary of State for India* 245

16. ————————————————, arts. 164, 169 :—*See* "CIVIL PROCEDURE CODE, ss. 108, 560, 582."

17. ————————————————, arts. 173A, 179—*Application in accordance with Law—Civil Procedure Code, Act XIV of* 1882, *ss.* 2, 228, 258, 649—*Where a Court passes a decree for sale of property and the place where such property is situate, is transferred to the jurisdiction of another Court, former Court may still execute decree—Application made to such Court to transfer decree to the latter will save limitation-bar—Representative of judgment-debtor is judgment-debtor within the meaning of s.* 258 *and must certify adjustment within time fixed by art.* 173A *of sched. II of the Limitation Act :*

The Court at *C* passed a decree for the sale of certain immoveable property. Subsequently the territory where such property was situate was transferred to the jurisdiction of Court *D*. The decree-holder applied to the Court at *C*, to transfer his decree for execution to the Court at *D*. The decree was transferred, and in execution, the purchaser of the equity of redemption from the judgment-debtor who was made a party to the execution proceedings pleaded that the application for execution was barred by limitation, and he also set up an adjustment between the judgment-debtor and the decree-holder made more than 90 days previously which was not certified to the Court. The questions arose whether the application to the Court at *C* for transfer was an 'application in accordance with Law' within article 179 of schedule II to the Limitation Act, and whether the purchaser from the judgment-debtor could plead the uncertified adjustment :—*Held*, that the Court at *C* did not, within the meaning of section 649 of the Code of Civil Procedure, cease to exist or to have jurisdiction to execute the decree on the transfer of territory from its jurisdiction, as such transfer did not take away the jurisdiction which it had to execute its own decree under section 228 of the Code of Civil Procedure, and the Court at *D* consequently acquired no jurisdiction to execute the decree under section 649, which could only arise, if the Court at *C* either ceased to exist or to have jurisdiction to execute the decree. The Court at *C* was, therefore, the Court to which the decree-holder was bound to apply under section 228 of the Code of Civil Procedure, and his application saved the bar of limitation under article 179 of schedule II of the Limitation Act. *Held also*, that the provision of section 258 of the

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Code of Civil Procedure applied not only to judgment-debtors, but to those claiming through them or in their right, and that an adjustment between the decree-holder and the judgment-debtor not certified within 90 days was barred under article 173 (A) of schedule II of the Limitation Act, and cannot be set up as a bar to execution by one claiming through the judgment-debtor or in his right.

Panduranga Mudaliar v. *Vythilinga Reddi* 537

8. ——————————, arts. 178, 179—*Article* 178 *applies where decree-holder obliged to refund seeks to execute his decree—Period runs from the date of order for such refund ;*

Where, a sale in execution of a decree is set aside at the instance of the judgment-debtor and the decree-holder is ordered to refund the purchase money paid to him, and the decree-holder subsequently applies to execute his decree, such application in regard to limitation is governed by article 178 and not 179 of schedule II to the Limitation Act and time begins to run against the decree-holder from the date when his order to refund the purchase money, when alone his right to apply accrues. *Issurree Dassee* v. *Abdool Khalak*, (I.L.R., 4 Calc., 415), followed. *Kalyanbhai Dipchand* v. *Ghanasham Lal Jademathji*, (I.L.R., 5 Bom., 29), followed.

Ramineedi Venkata Appa Rao v. *Lakkoju China Ayyanna* 209

9. ——————————, art. 179—*Application for execution against some defendants jointly liable under decree takes effect against all persons jointly liable :*

Where a decree awards mesne profits against A and B jointly and costs jointly against A, B and C, an application to execute the decree for mesne profits against A and B keeps alive the right to execute the decree for cost against C under part 2 of paragraph 2, explanation 1 to article 179 of schedule II to the Limitation Act. *Krishnamachariar* v. *Mangammal*, (I.L.R., 26 Mad., 91), referred to.

Subramanya Chettiar v. *Alagappa Chettiar* 268

10. ——————————, art. 179—*Application in accordance with law :*

A decree passed in a redemption suit directed "that the plaintiff do recover possession on payment of Rs. 865":—*Held*, that the payment of the amount was a condition precedent to the making of an order for the delivery of the property but not to the making of an application for a conditional order and that an application for execution of the decree without paying the amount was an application "in accordance with law" within the meaning of article 179, schedule II of the Limitation Act.

Syed Hussain Saib Rowthen v. *Rajagopala Mudaliar* 28

11. ——————————, art. 179—'*Step in aid of execution*'—*Application to bring on record representative of deceased judgment-debtor is a step in aid of execution—Civil Procedure Code, Act XIV of* 1882, *ss.* 232, 368—*Application under section* 368 *not prohibited by s.* 232 *:*

Under the proviso to section 232 of the Code of Civil Procedure, the transferee of a decree cannot obtain execution without notice to the judgment-debtor, and where the judgment-debtor is dead, no such notice can be sent until his representatives are brought on record. There is nothing in section 232 to prohibit the transferee from applying under section 368 to bring the representative on record and such an application must be regarded as a step in aid of execution within the meaning of schedule II of article 179 of the Limitation Act.

Mahalinga Moopanar v. *Kuppanachariar* 541

12. ——————————, art. 179—*Where second appeal preferred, time runs from date of order finally disposing of such appeal :*

Where a second appeal is preferred and an order is made by the Court to which the appeal is preferred which has the effect of finally disposing

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of the appeal, time runs from the date of such order; and it makes no difference that such second appeal was withdrawn by the appellant. *Patloji* v. *Ganu*, (I.L.R., 15 Bom., 370), dissented from *Abdul Rahiman* v. *Maiden Saiba*, (I.L.R., 22 Bom., 506), dissented from.

Peria Kovil Ramanuja Periya Jeeyangar v. *Lakshmi Doss* 1

23. ——————————————, art. 179 (5)—*Date of "issue of notice" means date of actual issue of notice and not date of order directing issue:*

The date of "issue of notice" from which time is to run under clause 5 of article 179 of schedule II of the Limitation Act is not the date on which the issue of the notice is ordered by the Court but the date of the actual issue of the notice. *Govind* v. *Dada*, (I.L.R., 28 Bom., 416), dissented from.

Cheruvath Thalangal Bapu v. *Nerath Thalangal Kanaran* 30

MADRAS REGULATION V OF 1804 (AS AMENDED BY ACT IV OF 1899), s. 35—*Rules 7, 9 of rules framed under s. 35—Procedure when Government rescinds notification after reference to Civil Court:*

Where the Collector, to whom a decree has been transferred for execution by virtue of a notification by Government under section 35 of the Amended Regulation V of 1804, makes a reference to the Civil Court under Rule 7 of the rules framed under the section and the Civil Court passes a decision in such reference and pending an appeal to the High Court against such decision, the Government rescinds the notification:—*Held*, that the proper course to be adopted by the High Court was to set aside the decision of the lower Court, without prejudice to the parties raising the question involved in the reference in execution proceedings in the Civil Courts.

Pulabaiyagari Munisamy Chetty v. *The Rajah of Karvetnagar* 193

MALABAR LAW:—*See* "COURT FEES ACT, s. 17."

2. ——————, **KANOM**—*Transfer of Property Act, Act* IV *of* 1882, *ss.* 59, 98 —*No notice necessary to determine Kanom right—Renewal of kanom can be effected only by registered deed—Document, construction of:*

The demisor in an instrument of kanom added at the end the words 'you shall obtain a renewed demise on the expiration of every twelve years and thus hold the kanom' and the corresponding kychit of the demise contained at the end the words 'I shall obtain a renewed demise on the expiration of every twelve years and thus hold the lands.' No mention was made of the rent payable on such renewals. No such renewal was made by a registered instrument although the demisee alleged that he had paid the renewal fees. In a suit by the demisor to redeem the *kanom*:—*Held*, that the document contained no covenant for perpetual renewal. *Held also*, that the transaction was not a mere lease, but was an anomolous mortgage under section 98 of the Transfer of Property Act, and no notice was required as in the case of leases to determine it. *Held further*, that a renewal can only be effected by a registered instrument under section 59 of the Transfer of Property Act. *Kurri Veerareddy* v. *Kurri Bapireddy*, (I.L.R., 29 Mad., 336), followed.

Gopalan Nair v *Kunhan Menon* 260

3. —————— *Otti-holder's right of pre-emption, nature of— Such right a right of election and not a right to veto—Right of pre-emption cannot be enforced by counter-claim by otti-holder in transferee's suit for redemption—Variation between pleading and proof—Plaintiff failing to prove plaint mortgage may be given a decree on mortgage admitted by defendant:*

The right of pre-emption which an otti-holder has by custom under Malabar law is only a right to elect whether he will purchase or not and not a right to veto a transfer by the janmi, without his knowledge. The otti-holder's right cannot be pleaded as a bar to a transferee's right to redeem, without an offer to purchase that right. Such an offer by the otti-holder cannot, in this country, be entertained as a counter-claim in a

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suit by the transferee of the janmi right for redemption, but must be enforced by a separate suit. *Kurri Veerareddi* v. *Kurri Bapireddi*, (I.L.R., 29 Mad., 339), followed. Case law on the otti-holder's right of pre-emption discussed. Where in a suit for redemption, the plaintiff fails to prove the mortgage set up by him, the Court may allow the plaintiff to redeem on the basis of a different mortgage, under which the defendant claims to hold.

Kadakamvalli Sankaran Mussad v. *Mokkath Ussain Haji* 388

MARRIED WOMAN'S PROPERTY ACT, s. 8 :—*See* "CIVIL PROCEDURE CODE, s. 266."

MERGER—*Decree in civil suit for rent bars subsequent summary proceedings under Rent Recovery Act by distress—Rent Recovery Act (Madras), Act VIII of* 1865, *s.* 39 :

A cause of action merges by reason of the judgment of a Court of record in a suit brought on such cause of action and without the judgment being satisfied. *King* v. *Hoare*, (13 M. & W., 494), referred to. A claim for rent is a single cause of action although it may be recovered either by distress or by suit, and when the landlord sues for the rent in a Civil Court, such claim merges in the judgment passed in such suit and can no longer be distrained for under the Rent Recovery Act.

Chinnappa Rowthan v. *Fischer* 495

MORTGAGE :—*See* "APPEAL."

MUHAMMADAN LAW—De facto *guardian, power of, over minor's property—Transfer of Property Act IV of* 1882, *s.* 51—*Equitable principle embodied in s.* 51 *not opposed to Muhammadan Law* :

Under Muhammadan Law, a sale by the mother, as *de facto* guardian of her minor son, of the property of such minor is not binding on him. The rule of equity embodied in section 51 of the Transfer of Property Act is not opposed to any principle of Muhammadan Law and section 2 does not preclude its application in cases decided under the Muhammadan Law. What constitutes good faith within the meaning of section 51 is a question of fact; and a person may act in good faith, though he acts under a mistake of law.

Durgozi Row v. *Fakeer Sahib* 197

2. ——————— *Gift—Gift by registered instrument not valid if unaccompanied by delivery of possession* :

The Muhammadan Law is applicable to gifts between Muhammadans, even when effected by registered instrument, and such a gift will be invalid unless the requirements of Muhammadan Law as to possession are complied with. *Chaudhri Mehdi Hasan* v. *Muhammad Hussan*, (L.R., 33 I.A., 68 at p. 75), followed. *Mogulsha* v. *Mahamad Sahib*, (I.L.R., 11 Bom., 517), referred to. *Alabi Koya* v. *Mussa Koya*, (I.L.R., 24 Mad., 513), not followed.

Vahazullah Sahib v. *Boyapati Nagayya* 510

3. ——————— *Gift—Nature of possession necessary to constitute a valid gift—Residence of donor—mother with daughter—donee does not make gift invalid* :

Under Muhammadan Law, to constitute a valid gift, possession must pass to the donee. Where a house and lands were given as a gift by a Muhammadan mother to her daughter and the daughter was put in exclusive possession of the lands and her title to both properties was perfected by mutation of names in the register, the mere fact that the mother continued to reside with her daughter, will not constitute a non-delivery of possession which will invalidate the gift. *Bava Sahib* v. *Mahomed*, (I.L.R., 19 Mad., 343), distinguished. *Humira Bibi* v. *Najm-un-Nissa Bibi*, (I.L.R., 28 All., 147), followed.

Kandath Veettil Bava v. *Musaliam Veettil Pakrukutti* 305

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NEGLIGENCE, *what amounts to bill of lading, construction of:*

M shipped 4,000 bags of rice in the S.S. *Thorndale* belonging to B for delivery at Tuticorin under a bill of lading, which contained amongst others the following condition: "The company is to have the option of delivering these goods or any part thereof into receiving ship or landing them at the risk and expense of the shipper or consignee as per scale of charges . . . . and is also to be at liberty until delivery to store the goods or any part thereof . . . . In all cases and under all circumstances, the liability of the Company shall absolutely cease when the goods are free of the ship's tackle and thereupon the goods shall be at the risk, for all purposes and in every respect of the shipper or consignee." The ship arrived at Tuticorin on the 23rd October and began discharging goods on the 24th. Heavy rains commenced on the 27th and continued till the 30th, but the discharge of the goods was not stopped and continued till the 30th. The bags got wet while being landed and became damaged by remaining on the foreshore without being immediately removed by M. M sued B for damages for the bags damaged and lost. It was found that the damage might have been averted if the bags had been removed by M immediately on their being landed and it was also found that B had not taken any precautions to protect the bags. On the above facts:—*Held*, that B was bound to take reasonable care and that his landing and stacking the goods uncovered on the foreshore during rainy weather amounted to actionable negligence. *Per* SUBRAHMANIA AYYAR, J., that the first of two conditions in the bill of lading did not apply to the landing of the goods and that the second condition did not exempt the defendants from liability for negligence as bailees till actual delivery on land. *Per* MILLER, J., *per contra.*—The second condition in the bill of lading applied to all stages of the transaction covered by the contract, including the stages of landing and storing and the defendants were thereby exempted from liability for their neligence on such operations. If the second condition should be struck out, the defendants will still be protected from liability by the first condition.

Sheik Mahamad Ravuthar v. *The British India Steam Navigatin Company* ... 79

NEGOTIABLE INSTRUMENTS ACT XXVI OF 1881, ss. 8, 78—*In a suit by a payee named in a negotiable instrument or an indorsee, plea that such payee or indorsee is benamidar not allowable:*

According to the law merchant which governed negotiable instruments in this country before the passing of the Negotiable Instruments Act, no person could sue on a negotiable instrument unless he were named therein as payee or had become entitled as endorsee or bearer. Sections 8 and 78 of the Negotiable Instruments Act have reproduced the law as it stood before the passing of the Act. The general provisions of the Indian Contract Act as regards the rights and liabilities of undisclosed principals were not intended to alter these well established rules as to negotiable instruments. In a suit on a negotiable instrument by the payee named therein or the indorsee, it is not open to the defendant to plead that such payee or indorsee, is a mere benamidar. *Ganapati Naiken* v. *Saminatha Pillay*, (C.R.P. No. 578 of 1895), unreported. *Gurumurti* v. *Sivayya*, (I.L.R., 21 Mad., 391), overruled.

Subba Narayana Vathiyar v. *Ramaswami Aiyar* 88

2. ——————————, ss. 8, 78—*Right of indorser indorsing for collection—Indorser on regaining possession of bill, may strike out name of indorsee and himself sue on the bill:*

The holder of a negotiable instrument within the meaning of section 8 of the Negotiable Instruments Act, to whom payment must be made under section 78 of the Act, is the person who, *on the face of such instrument is entitled in his own name* to the possession thereof and to receive or recover the amount due therefor from the parties thereto. *Subba Narayana Vathiar* v. *Ramaswamy Iyer*, (I.L.R., 30 Mad., 93), referred to. Where the drawer or indorser takes up a bill by paying the holder, he is

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entitled to strike out subsequent parties and maintain a suit on such bill against the parties antecedent to himself. Where a bill is endorsed for collection and is returned by the indorsee to the indorser, the former ceases to be the holder within the meaning of section 8 of the Act, and the latter can maintain a suit on the bill by striking out the name of the indorsee. English and American cases on the subject considered.

Subramania Chetty v. *Alagappa Chetty* 441

OCCUPANCY RIGHT, NATURE OF :—*See* "LANDLORD AND TENANT."

PENAL CODE—ACT XLV OF 1860, s. 342—*Officer arresting and confining judgment-debtor in house of judgment-creditor not guilty of wrongful confinement* :

An officer arresting a judgment-debtor, under a warrant which directs him to produce the judgment-debtor when arrested before the Court with all convenient speed, is not guilty of wrongful confinement if, having effected the arrest when the Court is not sitting, he confines him in the house of the judgment-creditor. His duty is to produce the judgment-debtor at the next sitting of the Court and until he so produces him, he is responsible for his safe custody.

Emperor v. *Samuel* 179

2. ———————————, **s. 494**—*Native Christian having Christian wife living and marrying Hindu woman, guilty of bigamy under the section* :

A Native Christian, who, having a Christian wife living, marries a Hindu woman according to Hindu rites without renouncing his religion, is guilty of an offence under section 494, Indian Penal Code. *In re Millard*, (I.L.R., 10 Mad., 218), followed in principle. *In re Ram Kumari*, (I.L.R., 18 Calc., 264), followed in principle. *Proceedings, dated 8th November* 1866, (3 M.H.C.R., App. VII), not followed. *Obiter* : It will make no difference even if he had renounced the Christian religion before contracting the second marriage.

Emperor v. *Lazar* 550

PENSIONS ACT XXIII OF 1871, s. 4—*Suit for maintenance under an agreement by which claim to pension and other properties is relinquished not a suit relating to pension and is cognisable by Civil Courts* :

Where a widow entitled to a portion of a pension and other properties, relinquishes such rights in consideration of a maintenance allowance, which is not made payable out of the pension and is not dependent on it, a suit by her to recover such allowance is not a suit 'relating to pension,' within the meaning of section 4 of the Pensions Act and is cognisable by Civil Courts. There is nothing in the Pensions Act which prohibits such relinquishment by the widow or the agreement to pay her maintenance.

Raja Venkatanarasimha Ramachandra Row v. *Raja Lakshminarasamma Row* 267

2. ———————————, **ss. 3, 11, 12**—*Section 12 applies only to pensions as stated in s. 11 and does not extend to grant of land revenue as defined in s. 3* :

Section 12 of the Pensions Act prohibits only the assignment of any money payable on account of any such pension, pay or allowance as is mentioned in section 11, and the pensions referred to in section 11 are periodical allowances made by Government on political considerations, or on account of past services or present infirmities or as a compassionate allowance. Payments of money for purposes other than those stated may be 'grants of money or land revenue' within the meaning of section 3, but the provisions of section 12 will not apply to them. *The Secretary of State for India* v. *Khemchand Jeychand*, (I.L.R., 4 Bom., 432), followed.

Subraya Mudali v. *Velayuda Chetty* 153

PORAMBOKE, WATER IN :—*See* "RENT RECOVERY ACT, ss. 4, 11."

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PRESCRIPTION—*Adverse possession—Possession by guardian* primâ facie *not adverse to the ward—Hindu Law—Reversioner, acceleration of succession of—No acceleration where gift to presumptive reversioner subject to obligations—Insolvent, undischarged, may sue for after acquired property moveable or immoveable if the Official Assignee does not intervene :*

It is well established that possession is never to be considered adverse if it can be referred to any lawful authority. Possession of the ward's property by a guardian will be presumed to be on behalf of the ward and will not in the absence of evidence to the contrary be held to be adverse to the ward. A gift by a Hindu widow of property in which she has a widow's estate to the presumptive reversioner, has not the effect of accelerating the succession of such reversioner if the transfer imposes on the reversioner obligations which would not have existed if the property had devolved on him by inheritance. An undischarged insolvent has, in respect of after acquired property, moveable and immoveable, a right against all the world except the Official Assignee and may sue to recover such property if the Official Assignee does not intervene.

Sriramulu Naidu v. *Andalammal* 145

PRINCIPAL AND AGENT—*Agent appointed by administrator not liable on the contract of agency to the person entitled to the estate :*

An agent appointed by the administrator of an estate, as such, cannot be proceeded against on such contract of agency by the person entitled to the estate, and it makes no difference that the administrator obtained the grant as the attorney of the mother and guardian of the person entitled.

Chidambaram Chetti v. *Pichappa Chetti* 243

PRINCIPAL AND SURETY—*Liability of surety—Liable for full amount decreed in the absence of any equity :*

Where principal and surety are jointly sued and a decree is passed against both for a certain amount and against the principal for the full amount, including the amount jointly decreed, the contract of suretyship is merged in the decree and the surety, when the whole amount has not been recovered from the principal, remains liable for the balance to the extent of the amount decreed against him unless he can show some equity in his favour which entitles him to say that he is not liable for the full amount decreed against him. No such equity arises, because the amount recoverable by attachment and sale from the principal was reduced by rateable distribution among other creditors of the principal by an order under section 295 of the Code of Civil Procedure; nor can the surety claim that a proportionate share of the amount realised from the principal must go to reduce his own liability.

Appasami Ayyangar v. *Ramanatham Chettiar* 167

PROBATE—*Executor according to the tenor—Probate to executor according to the tenor granted only where discharge of such duties as executors have to perform are included :*

Where property is left by a will to trustees, they will not be entitled to probate as executors according to the tenor, unless it appears from the will that they have to discharge such duties as executors have to perform.

Appacooty Mudali v. *Muthu Kumarappa Mudali* 191

PROCESSIONS—*Public worship of idol—Claim to exclusive right to have procession in public streets—Dispute between rival sects of Vaishnava Brahmins—Streets vested in Local Board under Madras Local Boards Act (Madras Act V of* 1884)—Res judicata—*Ownership of land in village—Presumptive dedication to idol :*

The plaintiffs, members of the community of the Vadagalai sect of Vaishnava Brahmins, claimed the exclusive right to public worship of their idol and processions in its honour in the public streets of the village where they resided, and to prohibit the defendants, members of the Tengalai sect in the same village, from publicly worshipping the Tengalai idol or

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carrying it in processions in the public streets. The claim was based on the grounds (1) that the Vadagalais were the original owners of all the land of the village and only allowed houses to be built and streets formed subject to the reservation that no worship or procession of a Tengalai idol should be allowed in them, thus dedicating them to their own idol; (2) that, in the alternative, they had by immemorial usage and custom the right to prevent such worship or processions in the streets; and (3) that so far as the Tengalai idol was concerned the rights of the parties were *res judicata* by the decision in a former suit:—*Held*, that the ownership of the village by the Vadagalais was not proved, nor any dedication of the streets exclusively to their idol; and that no such custom as alleged had been established; the village was an ordinary ryotwari village; the streets were public streets now vested, under the Madras Local Boards Act (Madras Act V of 1884), in the Local Board. All members of the public had an equal right in them. If the Vadagalais had any objection to the streets being so vested, they had had the opportunity when the Act was passed of raising the objection by appeal to the Governor-General in accordance with the provisions of the Act. Not having done so it was now too late to set up any claim:—*Held*, also that the former suit was not a representative suit binding property, nor a suit framed for the purpose of binding the Tengalai sect for all time. It was a suit against certain persons alleged to be wrong doers in their individual capacity: the decision in it was therefore not *res judicata* in the present suit.

Sadagopa Chariar v. *Krishnamoorthy Rao* 185

PROVINCIAL SMALL CAUSE COURTS ACT, ACT IX OF 1887, s. 35—*Application under, to be made in Court having jurisdiction at time of application:*

Where a Court of Small Causes is abolished after having passed a decree, the Court in which, under section 35 of Act IX of 1887, proceedings are to be taken in respect of such decree, is the Court in which the suit if instituted at the time of such application would have to be instituted. Where the jurisdiction in such a case is to be determined by considering the place of residence of the defendant, his residence at the time of the application is to be considered as his place of residence.

Kurella Chenchayya v. *Polisetti Sitaramaswamy* 217

2. ——————————————, **sched. II, art. 41**:—*See* "CIVIL PROCEDURE CODE, s. 586."

RENT RECOVERY ACT, ACT VIII OF 1865—*Exchange of patta and muchilika not necessary between zamindar and inamdar to enable former to take proceedings under Act:*

No exchange of patta and muchilika is necessary to enable a zamindar to take summary proceedings against an inamdar as his tenant under Madras Act VIII of 1865, even when such inamdar has the kudivaram right in the land held by him. *Lakshmi Narayana Pantulu* v. *Venkatarayanam*, (I.L.R., 21 Mad., 116), referred to. *Krishnama Charlu* v. *Renga Chariar*, (16 M.L.J., 489), referred to.

Zamindar of Chellapalli v. *Kuchi Jagayya* 493

2. ——————————————, **ss. 4, 11**—Res judicata—*Contract to pay tax on improvements legal—Previous decision in summary suit binding in subsequent suits—Poramboke, water in—Water in poramboke lands not Sircar water—Appeal, powers of Court in—Appellate Court may by consent order trial on issues not raised in appeal:*

Water in poramboke lands belonging to mirasidars cannot be said to be Sircar water and taxed as such. The effect of an appeal is to reopen the decree of the lower Court and it is competent to the Appellate Court on the agreement of parties to remand the case for trial on issues not raised in the memorandum of appeal. The decision of a Revenue Court as to the propriety of a particular condition in a patta, when such decision does not proceed on any considerations peculiar to the particular fasli, is *res judicata* between the parties in subsequent suits in the same Courts. *Venkatachalapati* v. *Krishna*, (I.L.R., 13 Mad., 287), referred to. Section 11 of the Madras Rent Recovery Act contemplates rents being fixed by contract

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and it is only in the absence of contracts express or implied that resort is to be had to the methods of fixing rent specified in clauses 2 and 3 of the section. There is nothing in clause 4 to make contract illegal which would have the effect of giving the landlord a share in the benefit of the tenants improvements. A *custom* to this effect may be opposed to the proviso to clause 4, but a contract is expressly authorised by the section and is not opposed to anything in the proviso. *Gopalasawmy Chetti* v. *Fisher*, (I.L.R, 28 Mad., 328), referred to.

Natesa Gramani v. *Venkatarama Reddi* 510

3. ——————————————, s. 18—*Seven days required by the section means seven clear days—Limitation Act XV of* 1877, *art.* 91—*Does not apply to defendants in possession :*

A defendant in possession is not precluded from setting up the invalidity of a sale, because his right to have it set aside was barred at the date of suit by article 91 of schedule II to the Limitation Act. The seven days which, in fixing the day of sale under section 18 of the Rent Recovery Act, must be allowed from the time of notice, are seven whole days, and not seven periods of 24 hours calculated from the hour of the day on which the notice was issued. *McQueen* v. *Jackson*, ((1903), 2 K.B., 163), referred to.

Ramanasari v. *Muthusawmi Naik* 248

4. ——————————————, ss. 38 and 39—*Sale on excessive demand illegal—Institution of civil suit for rent after taking summary proceedings no bar to proceeding with the latter—Limitation Act, Act XV of* 1877, *sched. II, art.* 12—*No bar to defendant in possession pleading invalidity of sale :*

Where notice of demand by the landlord under section 39 of the Rent Recovery Act, claims a larger amount than is legally due from the tenant, a sale under the Act by the landlord for non-compliance with such excessive demand is illegal, and no subsequent alteration of the amount to the proper figure can validate such sale. *Pichuvayangar* v. *Oliver*, (I.L.R., 26 Mad., 261), followed. Where the landlord institutes a civil suit for the rent after taking proceedings under the Act, such proceedings, if pleaded by defendant, will be a valid defence to the suit; but *semble* the mere institution of the suit will not make it illegal to proceed further with the summary proceedings. If the suit is allowed to proceed to judgment, the debt will merge in the decree and further summary proceedings will be illegal, but a sale before judgment will be valid. *Chancellor* v. *Webster*, (9 T.L.R., 568), referred to. A defendant in possession whose right to sue to set aside a sale is barred by article 12 of schedule II of the Limitation Act, may set up the invalidity of such sale as a defence. *Lakshmi Doss* v. *Roop Laul*, (I.L.R., 30 Mad., 169), referred to.

Venkatachalapathy Ayyar v. *Robert Fischer* 444

5. ——————————————, ss. 41, 43, 69—*'Judgment'—Decision of Collector setting aside an order for ejectment under s.* 41, *is a 'judgment' and appealable as such :*

The term 'judgment' as used in Madras Act VIII of 1865 must be held to include all decisions of a Collector determining the rights of parties. Where a tenant, ordered to be evicted under section 41 of the Act, applies to the Collector to set aside the order evicting him the decision of the Collector on such application is a 'judgment' whether the application of the tenant is considered as a plaint in a summary suit to set aside the improper eviction or as an appeal under section 43 or not, and an appeal lies against such judgment under section 69 of the Rent Recovery Act. Such right of appeal exists in favour of the landholder as well as of the tenant. *Madai Thalavoy Kummarasamy Mudaliyar* v. *Nallakannu Tevan*, (5 M.H.C.R., 289), not approved.

Dontaraju Subbarayudu v. *Nekkalapudi Lingayya* 473

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6. ——————————, s. 85—*Section 85 empowers receivers to sue under the Act and also makes them liable to be sued without leave of Courts :*

A receiver appointed by Court is a public officer holding lands in attachment within the meaning of section 85 of Madras Act VIII of 1865. The section imposes on him the duty of granting pattas to tenants and the liability to be sued under the Act for failure to do so. No leave of Court is necessary to enforce the statutory right of suing such receiver conferred by the section.

Receiver of Ammayyanaikanur Zamin v. *Suppan Chetty*... 505

RES JUDICATA :—*See* "CONTRACT ACT, s. 69."

2. ——————*See* "LIMITATION ACT, SCHED. II, ART. 79, CL. 6."

3. ——————*See* "LIMITATION ACT, SCHED. II, ARTS. 95, 120."

4. ——————*See* "RENT RECOVERY ACT, SS. 4, 11."

5. ——————*Decision in previous suit binding as* res judicata *between the co-defendants if the matter in issue in the subsequent suit actively contested at previous trial :*

A decision in a previous suit on a matter raised and actively contested between co-defendants in such suit will operate as *res judicata* in a subsequent suit in which such co-defendants are arranged as plaintiff and defendant. *Kandiyil Cheriya Chandu* v. *The Zamorin of Calicut*, (I.L.R., 29 Mad., 515), followed. The fact that the defendant in the previous suit had no right of appealing against the decision because the suit was dismissed, will not affect the operation of the bar, when such defendant having the right to be joined as a plaintiff chose to contest the suit as a co-defendant. The Full Bench decision in *Somasundara Mudali* v. *Kulandai Velu Pillai*, (I.L.R., 28 Mad., 457), is not in conflict with *Kandiyil Cheriya Chandu* v. *The Zamorin of Calicut*, (I.L.R., 29 Mad., 515). Where a decision dismissing a suit is in fact wholly against the defendant, such defendant can appeal against it. *Krishna Chandra* v. *Mohesh Chandra Saha*, (9 C.W.N., 584), approved.

Yusuf Sahib v. *Durgi* 447

6. ——————**IN RENT SUITS**—*Objection to terms of patta not taken in previous summary suit cannot be taken in suits for subsequent year :*

Where the tenant in a summary suit brought against him to enforce acceptance of patta, does not object to some stipulations in the patta, and the judgment directs him to accept a patta containing such stipulations, such judgment is a bar to the tenant setting up the same objections in a suit to enforce patta for a subsequent year. *Venkatachallapati* v. *Krishna*, (I.L.R., 13 Mad., 287), followed. Payments of a voluntary nature cannot be included in the patta unless they constitute a charge on the land or are payable with rent according to established law or usage.

Sellappa Chettyar v. *A. Velayutha Tevan* 498

REVENUE RECOVERY ACT (MADRAS) II OF 1864, s. 35—*Mortgagor, or incumbrancer—Unregistered owner not bound to pay the revenue—Contract Act IX of 1872, s. 69—Money voluntarily paid cannot be recovered back unless the party for whom such payment is made is bound to pay it—Applies only where party paying is tenant :*

An action to recover money paid is not maintainable under section 69 of the Indian Contract Act, unless the person from whom it is sought to be recovered was bound to pay it. On this point the law under section 69 of the Indian Contract Act is the same as the English Law. *Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society*, (1899, 1 Q.B., 161), referred to. The revenue due on land owned by one who is not the registered holder is not money which such owner is bound to pay under the Revenue Recovery Act, though it may be to his interest to do so and the registered holder voluntarily paying such revenue cannot

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recover it under section 69 of the Contract Act. Neither can he recover it under section 35 of the Revenue Recovery Act unless he is a tenant, mortgagor or incumbrancer of such land.

Boja Sellappa Reddy v. *Vridhachala Reddy* 35

2. ———————— *See* "CONTRACT ACT, s. 69."

3. ———————— s. 59, AND REGULATION VII OF 1828—*Cause of action to set aside sale under s. 59 arises when sale is confirmed and not from date of Collector's order on revision :*

The period of six months allowed for suits to set aside sales under section 59 of Madras Act II of 1864 must be calculated from the date when the sale is confirmed and not from the date when the Collector on revision under Regulation VII of 1828 passes his final order. The party is aggrieved when the sale is confirmed and the fact that it was open to him to move the Collector does not postpone his cause of action. *Sabapathy Chetty* v. *Rengappa Naicken*, (I.L.R., 26 Mad., 495), distinguished.

Chinnammal Achi v. *Saminatha Malavaroyan* 367

SALE IN EXECUTION—*Right of person deriving title from a purchaser at such sale—Such person's rights not affected by any error or fraud in procuring the decree—Decree passed under such circumstances only voidable not void :*

A decree passed by a Court having jurisdiction over the subject-matter, is not void but only voidable when it is passed under a misapprehension or is brought about by fraudulent proceedings. The party against whom the decree is passed has only an equity to set aside the proceedings. Where property sold in execution of such a decree is purchased by the decree-holder and by him sold for value to a third party who has no notice of any defect in the decree, the equitable right to set aside such decree cannot prevail against the rights of the subsequent purchaser for value without notice. A person claiming through a Court purchaser, is entitled to rely upon the plea that he is a *bonâ fide* purchaser for value without notice, though he cannot claim the rights of a stranger purchasing at Court sale. *Marimuthu Udaiyan* v. *Subbaraya Pillai*, (13 M.L.J., 231), followed.

Sheik Ismal Rowther v. *Rajab Rowther* 295

2. ———————— OF DECREE ON SIMPLE MORTGAGE—*Purchaser at such sale cannot maintain suit for possession against purchasers of the equity of redemption subsequent to mortgage but prior to suit, who were not joined as parties :*

A, who held lands in kanom tenure, executed a simple mortgage on them in favour of *B* and subsequently sold the properties to *C*. Subsequent to such sale *B* brought a suit on his simple mortgage against *A* without making *C* a party and obtained a decree for sale. *D* became purchaser at the sale held in execution of a decree. In the suit by *D* against *A* and *C* for possession of the properties purchased at the Court sale :—*Held*, that *D* was not entitled to sue for possession, as all that passed to him at the sale was the right of *B* as a simple mortgagee. *Hargu Lal Singh* v. *Gobind Rai*, (I.L.R., 19 All., 541), followed.

Entholi Kizhakkikandy Kanaran v. *Vallath Koylil Unnooli* 500

SENTENCE, ENHANCEMENT OF :—*See* "CRIMINAL PROCEDURE CODE, s. 423."

SPECIFIC RELIEF ACT I OF 1877, s. 42—*Presumptive reversioner, entitled after widow's death, may sue to set aside will of last male holder :*

The right of the presumptive reversioner to sue for a declaratory decree under section 42 of the Specific Relief Act is not restricted to the class of transactions referred to in illustrations (*e*) and (*f*) to that section, *i.e.*, to transactions by the widow herself. Where on the death of the last male owner, leaving a widow, the properties belonging to him, are claimed by

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divisees under a will alleged to have been left by him, the nearest reversioner in existence is entitled to sue for a declaration that the alleged will was invalid and did not bind his reversionary interest.

Puttanna v. *Ramakrishna Sastri* 195

STAMP ACT—ACT I OF 1879, s. 35—*No secondary evidence admissible the receiving which will be to give some effect to an unstamped document :*

In a suit by plaintiffs to redeem lands alleged to have been mortgaged under an instrument in 1841, the document was not produced and therefore secondary evidence was not receivable to prove the contents of the document. The plaintiff sought to rely on the oral evidence as to execution of the document and the passing of possession under the deed as showing that the defendant by such possession acquired only a mortgagee's right in the property :—*Held*, that the receiving of such evidence will be to give some effect to the unstamped document by connecting the possession with the contents thereof, and was therefore contrary to the provisions of section 35 of the Indian Stamp Act. An admission of the mortgage by the defendants' ancestor was also held not receivable on the same grounds. *Chenbasapa* v. *Lakshmanan Ramchandra*, (I.L.R., 18 Bom., 369), referred to.

Thaji Beebi v. *Tirumalaiappa Pillai* 386

SUCCESSION CERTIFICATE ACT, ACT VII OF 1889—*Successor to impartible zamindari not entitled to recover debts due to his predecessor without a certificate under the Act :*

The successor to an impartible estate is not a co-owner with his predecessor in the moneys due to the latter before his death. He derives his title to such debts only at the death of his predecessor, as part of such predecessor's effects and cannot recover them without obtaining a certificate under Act VII of 1889. The rule of succession in impartible estates is based on a theoretical co-parcenary and not on any actual unity of interest between the predecessor ahd his successor, and this theoretical community of interest can be applied only for the purpose of determining the succession and for no other purpose whatsoever. *The Pittapore Case*, (I.L.R., 22 Mad., 397), referred to. Observations of *Sankaran Nair, J.*, in *Nachiappa Chettiar* v. *Chinnayasami Naicker*, (I.L.R., 29 Mad., 459), considered and not followed. *Kali Krishna Sarkar* v. *Raghunath Deb*, (I.L.R., 31 Calc., 224), not followed.

Rajah of Kalahasti v. *Achigadu* 454

SUCCESSION ACT, ss. 56, 57 : —*See* "HINDU LAW, WILL."

SUPERINTENDENCE, POWERS OF, OF HIGH COURT—*Criminal Proceedings, stay of, when civil suit on same facts pending :*

The defendant in a civil suit ought not to be allowed to prejudice the trial of such suit by launching and proceeding with a criminal prosecution on the same facts against the plaintiff and his witnesses and such proceedings if launched, will be stayed by the High Court in the exercise of its powers of superintendence. *Eadara Viranna* v. *The Queen*, (I.L.R., 8 Mad., 400), distinguished; In re *Devaji Valad Bhavani*, (I.L.R., 18 Bom., 581), distinguished; and (*Raj Kumari Debi* v. *Bamasundari Debi*, (I.L.R., 23 Calc., 610), distinguished.

Anna Ayyar v. *Emperor* 226

TRANSFER OF PROPERTY ACT IV OF 1882, s. 6 (a)—*Hindu Law, Reversioner—Renunciation of reversionary right is a transfer of an expectancy and as such is void—Limitation Act XV of 1877, sched. II, art. 127—Time does not run until sharer excluded :*

A, a member of an undivided Hindu family, was adopted by one *V*, a widow. His adoption was declared invalid in 1888. He consented to reside with *V*, and in 1896 orally renounced his right to a share in the property belonging to his natural family in consideration of his co-sharers who were also the reversioners of *V* renouncing the reversionary right in the properties held by *V* as the heiress of her husband. In a suit brought

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by *A* in 1901 for partition of the property in his natural family :—*Held*, that *A*'s residing with *S* from 1883 to 1896 did not amount to an abandonment by *A* of his right to partition or to an exclusion of *A* to his knowledge, from the enjoyment of his family property and that his right to partition was not barred by article 127, schedule II of the Limitation Act:—*Held further*, that the renunciation of their reversionary rights by the reversioners amounted to a transfer of an expectancy and was a nullity under section 6 (*a*) of the Transfer of Property Act, and that such renunciation cannot be a good consideration for a contract.

Dhoorjeti Subbayya v. *Dhoorjeti Venkayya* 201

2. ——————————————, s. 6 (*a*)—*Transfer of bare expectancy by mortgagor or by consent decree void*—Res judicata *in execution proceedings—Order passed after notice no* res judicata *when notice silent as to prayers claimed—Receiver, continuation of, by Appellate Court—Amendment of execution petition, power of Court to allow* :

A, the owner of an impartible and inalienable zamindari, which passed on the death of the owner for the time being, who had only a life estate, to the senior male member of the family mortgaged it to B in 1892 without possession. Four male members of the family *C*, *D*, *E*, *F*, who were in the line of heirs joined *A* in executing the martgage. Subsequently some usufructuary mortgages were executed to *B*, and *B* was in possession of the zamindari. In 1894, Criminal Suit No. 43 of 1894 was brought by *B* against *A*, *C*, *D*, *E*, *F*, and others to recover the amount due under the mortgage of 1892. A consent decree was passed making defendants *A*, *C*, *D*, *E*, *F* liable for the amount and directing that in case the amount was not recovered in the life-time of *A*, it should be recovered from the other defendants when they succeeded to the estate and the zamindari was made liable for the decree amount. *A* died in 1904. He was succeeded by one not a party to the suit and on the latter's death in 1905, *C* succeeded as Zamindar. In 1899 and 1903 two applications for execution by sale of the *whole zamindari* were put in by *B* and were granted after notice served on *C*. The notices however only stated that application was made for execution of the decree but the reliefs asked for were not stated. *A* applied again for execution in 1905. The prayer was for sale of the zamindari and for the appointment of a Receiver but the prayer for sale was given up at the trial. *C* raised various objections which were overruled and the Sub-Judge appointed a Receiver to take charge of the zamindari and its appurtenances. *C* appealed:—*Held*, on appeal, that *C* in 1892 was not a dormant co-owner with *A* in the zamindari and that the mortgage by *C* of his right in the zamin in 1892 was a transfer of a bare expectancy and was a nullity under section 6 (*a*) of the Transfer of Property Act. The prohibition in section 6 (*a*) of the Transfer of Property Act is based on principles of public policy, and the Court cannot allow such transactions to be effected by a consent decree. *Lakshmanaswami Naidu* v. *Rengamma*, (I.L.R., 26 Mad., 31), referred to. The principles of equity, on which English Courts grant relief in such cases when the property actually vests cannot be given effect to in the face of express prohibition contained in section 6 (*a*) of the Transfer of Property Act. An order passed in execution proceedings will be *res judicata* only when the notice gives sufficient intimation of the reliefs prayed for. *Narayana Pattar* v. *Gopalakrishna Pattar*, (I.L.R., 28 Mad., 355), followed. *Held further*, that as the Receiver was validly appointed on the ground that the property was the subject-matter of the suit, the Appellate Court had jurisdiction to maintain him as a means of realising the amount from the judgment-debtor personally and the property must be considered under attachment, though not attached under section 274 of the Code of Civil Procedure. Amounts realised by a usufructuary mortgagee in possession after decree for sale cannot be applied in satisfaction of the decree amount unless certified under section 258 of the Code of Civil Procedure. *Held also*, that under the circumstances of the case the decree-holder may be considered to have applied for the enforcement of the decree against *C* personally and the order of the lower Court upheld on that ground.

Amendment of petition by inserting a prayer for execution against *C* personally allowed.

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3. ———————————, s. 10:—See "CIVIL PROCEDURE CODE, s. 266."

4. ———————————, s. 51—*Equitable principle embodied in s. 51 not opposed to Muhammadan Law—Muhammadan Law*—De facto *guardian, power of, over minor's property :*

Under Muhammadan Law, a sale by the mother, as *de facto* guardian of her minor son, of the property of such minor is not binding on him. The rule of equity embodied in section 51 of the Transfer of Property Act is not opposed to any principle of Muhammadan Law and section 2 does not preclude its application in cases decided under the Muhammadan Law. What constitutes good faith within the meaning of section 51 is a question of fact and a person may act in good faith, though he acts under a mistake of law.

Durgosi Row v. *Fakeer Sahib* 197

5. ———————————, s. 55—*Vendor, lien of unpaid—Lien is not possessory but only a charge—Adverse possession :*

The lien of the unpaid vendor of land under section 55 of the Transfer of Property Act is non-possessory. He has only a right to retain the title-deeds and to a charge for the unpaid purchase money, but he cannot retain possession of the property sold against the vendee.

Velayutha Chetty v. *Govindasawmi Naiken* 524

6. ———————————, ss. 55, 59: —See "COVENANT, CONSTRUCTION OF."

7. ———————————, ss. 59, 98: —See "MALABAR LAW."

8. ———————————, s. 65—*Purchaser of equity of redemption from mortgagor not bound to pay public charges and is not when he purchases the lands at a revenue sale a constructive trustee under s.* 90 *of the Trusts Act—Appeal, abatement of—No abatement by death of respondent when appeal could proceed in the absence of his representative—Mortgage, lien of property paying prior, extinguished when part of mortgaged property is purchased for such amount—Sale for revenue—Trusts Act II of* 1882, *s.* 90 *:*

An appeal does not abate by reason of the failure of an appellant to bring on record the representative of a deceased respondent within the time prescribed therefor, if the appeal can proceed, in the absence of such representative, to a final and complete adjudication. Where a person paying off a prior mortgage, purchases a portion of the mortgaged properties, in consideration of the amount so paid to him, the lien acquired by such payment is extinguished and cannot be used as a shield against a subsequent mortgagee by such purchaser. The assignee of a mortgage decree purchasing a portion of the mortgaged properties, acquires over such portion a lien for only a proportionate share of the mortgage amount. The implied covenant on the part of the mortgagor, under section 65 of the Transfer of Property Act, to pay the public charges on the properties mortgaged does not extend to the purchaser of the equity of redemption from the mortgagor. Such purchaser in omitting to pay such charges does dot fail to discharge any obligation owing from him to a mortgagee of the said properties, and in purchasing such properties at a revenue sale for non-payment of such charges, he does not gain an advantage as qualified owner in derogation of the rights of the mortgagee or other persons interested in the property so as to constitute him a constructive trustee for them under section 90 of the Trusts Act.

Ranga Srinivasa Chari v. *Gnanaprakasa Mudaliar* 67

9. ———————————, ss. 67, 96, 97—*Person holding two mortgages on the same property, the first usufructuary and the second simple, can bring the property to sale in suit on the second mortgage free of the first mortgage :*

A person holding two mortgages on the same property, the first a usufructuary and the second a simple mortgage, can sue under section 67 of the Transfer of Property Act to recover the money on the simple

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mortgage by bringing the property to sale free of the usufructuary mortgage. The decree in such a case should direct the property to be sold and the sale-proceeds to be applied first in discharge of the usufructuary mortgage and the balance in discharging the second mortgage. The fact that no suit for sale could be brought on the usufructuary mortgage will be no bar to such mortgage being paid out of proceeds derived by the sale of the property on another mortgage. *Govinda Bhatta* v. *Narain Bhatta*, (I.L.R., 29 Mad., 424), followed in principle. *Bhagwan Doss* v. *Bhawani*, (I.L.R., 26 All., 14), not followed. Sections 96 and 97 of the Transfer of Property Act do not in terms exclude usufructuary mortgages and their provisions may be applied to such mortgages.

Rengasami Nadan v. *Subbaroya Iyen* 406

10. ———————————, s. 85—*Mortgagee holding two mortgages on same property and who has sued on the first mortgage and sold the property without mentioning the second mortgage, cannot sue on his second mortgage:*

A mortgagee who is made a defendant under section 85 of the Transfer of Property Act and who omits to set up a mortgage is barred from suing on such mortgage when in consequence of his omission the property is ordered to be sold free from the mortgage which had not been pleaded. *Sri Gopal* v. *Pirthi Singh*, (I.L.R., 24 All., 429), referred to. A party holding two mortgages on the same property and suing on the first mortgage alone, is in respect of the second mortgage a party to the suit under section 85 of the Transfer of Property Act; and if he omits to mention, his second mortgage and the property is ordered to be sold free of such mortgage, he cannot afterwards sue to enforce his second mortgage against such property. *Sunder Singh* v. *Bholu*, (I.L.R., 20 All., 322), dissented from. *Dorasamy* v. *Venkatasesha Aiyar*, (I.L.R., 25 Mad., 108), followed.

Nattu Krishnama Chariar v. *Annangara Chariar* 358

11. ———————————, ss. 88, 90—*Mortgage decree under s.* 88 *cannot impose personal liability for costs—Such liability should be enforced under s.* 90 *:*

It will be contrary to the scheme of the Transfer of Property Act and to the practice of the English Courts of Equity to make the mortgagor personally liable for costs in any case before the sale-proceeds have proved insufficient to satisfy the mortgage claim. *Sharples* v. *Adams*, (32 Beav., 213), referred to. *Liverpool Marine Credit Co.* v. *Wilson*, (L.R., 7 Ch., 507), referred to. A decree under section 88 of the Transfer of Property Act must not order the defendants personally to pay the costs. It may contain a declaration of the personal liability of defendant for principal or costs, but such a declaration is not part of the usual form of decree under the Transfer of Property Act and is enforceable only under section 90. The words 'the amount due on the mortgage for the time being' in section 90 must be taken to include costs. *Maqbul Fatima* v. *Lalta Prasad*, (I.L.R., 20 All., 523), referred to.

Kamalamma v. *Komandur Narasimha Charlu* 464

12. ———————————, s. 99—*Equitable principles of s.* 99 *not applicable against a purchaser not the mortgagee and not a party to the suit in which property was sold—Sale in contravention of s.* 99 *only voidable, not void—Civil Procedure Code—Act XIV of* 1882, *s.* 244, *bar to parties questioning sale :*

The equitable right of the mortgagor to redeem property brought to sale in contravention of section 99 of the Transfer of Property Act by the mortgage, cannot arise when the auction purchaser at such sale is not the mortgagee, and is no party to the suit in which the property was sold. *Mayan Pathutti* v. *Pakuran*, (I.L.R., 22 Mad., 347), distinguished. Such a sale is only voidable, not void. Parties to the suit must question the validity of the sale in execution and a separate suit will be barred by section 244 of the Code of Civil Procedure.

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13. ———————————————————, s. 99—*Mortgaged property purchased by mortgagee in execution of a money decree on the mortgage debt, not redeemable by the mortgagor:*

A mortgagee sued the mortgagor for an instalment of the mortgage debt and obtained a simple money decree. In execution of such decree, the mortgagee brought to sale and purchased the mortgaged property. In a suit by the mortgagor brought to redeem the mortgaged property:—*Held*, that the mortgagor, having been a party to the decree and to the order for sale, was not entitled to redeem. *Muthuraman Chetty* v. *Ettappasami*, (I.L.R., 22 Mad., 372), followed. *Mortand Balakrishna Bhat* v. *Dhondo Damodar Kulkarni*, (I.L.R., 22 Bom., 624), dissented from. *Kamini Debi* v. *Ramalochan Sirkar*, (5 B.L.R., 450), dissented from.

Dharanikota Venkayya v. *Budharazu Surayya Garu* 362

14. ———————————————————, ss. 105 and 107—*Lease, within the meaning of, can only be effected by written instrument signed by the lessor:*

A 'lease' as defined by section 105 of the Transfer of Property Act, is a transfer of property, and such a transfer can only be made by the person in whom the property to be transferred is vested. The registered instrument by which a lease can be effected under section 107 of the Transfer of Property Act must be an instrument bearing the signature of the lessor. *Ambalavana Pandaram* v. *Vagurau*, (I.L.R., 19 Mad., 52). *Seshachela Naiker* v. *Varadachariar*, (I.L.R., 25 Mad., 55), distinguished.

Yusof Sahib v. *Esuf Sahib* 322

15. ———————————————————, s. 106—*Notice to quit—Monthly period of tenancy not necessarily reckoned from date of lease—May be calculated from different date if such was the intention of the parties:*

It is open to the parties to a lease to agree that the monthly period of a tenancy should be reckoned from a date different from that on which the lease is executed, and fifteen days' notice to the tenant expiring with the end of a month of the tenancy as so reckoned is a sufficient notice under section 106 of the Transfer of Property Act. Where a lease is executed and the tenant enters on possession and is liable for rent from the middle of a month, but the rent is made payable, not on dates calculated from the date of such lease but at the end of the calendar month, the reasonable inference, in the absence of any thing to the contrary in the instrument, is that for determining when the tenancy was to expire, the parties agreed that the monthly tenancy should coincide with the calendar month.

Arunachella Chettiar v. *Ramiah Naidu* 109

16. ———————————————————, s. 108 (*j*)—*Assignee of lease, liability of, to lessor—Liable for rent from date of assignment and not from date of obtaining possession—Principle applies to agricultural leases:*

Under section 108 of the Transfer of Property Act a lessee may transfer his privity of estate to an assignee, thus rendering the latter liable to the lessor on covenants running with the land, while he himself will continue liable to the lessor by reason of his privity of contract which does not pass by assignment. The liability of the assignee arises from the date of assignment and not from the date when he obtains possession. This is the law in England and there is nothing in the Transfer of Property Act to make a different rule applicable in this country. *Kunhanujam* v. *Anjelu*, (I.L.R., 17 Mad, 296), referred to. Although the Transfer of Property Act does not apply to agricultural leases, there is no reason why the above rule should not be applied to them as well as to non-agricultural leases. The assignee of an agricultural lease becomes liable for the rent payable to the lessor from the date of assignment. *Kamala Nayak* v. *Ranga Rao*, (I.M.H.C.R., 24), dissented from. *Macnaghten* v. *Lalla Mewa Lall*, (3 Calc., L.R., 285), dissented from.

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17. ———————, s. 119—*Breach of condition constituting cause of action under s. 119 of the Transfer of Property Act, arises at date of final decree on appeal—Limitation Act, XV of 1877, s. 10—Does not apply in suits against assignees for valuable consideration :*

A, the trustee of a temple, exchanged certain temple lands with *B* and obtained certain lands from *B* in exchange. *C* brought a suit against *A* to recover the land obtained by *A* in exchange from *B* and possession was decreed in favour of *C*, and *A* was deprived of possession in execution of the decree on 18th December 1890. *A* preferred appeals successively to the District Court and to the High Court and the decree was confirmed on second appeal on the 23rd February 1892. On the 22nd February 1904, *A's* successor brought a suit against *B* to recover the lands got by *B* from *A* :—*Held*, that the dispossession of plaintiffs which entitled him to bring a suit under section 119 of the Transfer of Property Act must be held to have taken place only when the decree for possession against him was confirmed on second appeal by the High Court. *Held further*, that section 10 of the Limitation Act did not apply to the suit. The section proceeds upon the well-known distinction between transfers for valuable consideration and voluntary transfers, and the transfer in this case is not the less a transfer for valuable consideration, because the consideration subsequently failed. Section 10 does not deprive tranferees for valuable consideration of the benefits of the statute. *Basu Kuar* v. *Dhum Singh*, (I.L.R., 11 All., 47), followed. *Hanuman Kamat* v. *Hanuman Mandur*, (I.L.R., 19 Calc., 123), distinguished. *Tulsiram* v. *Murlidhar*, (I.L.R., 26 Bom., 750), distinguished.

Rajagopalan v. *Kasivasi Somasundara Thambiran* 318

18. ———————, s. 130—*'Actionable claim'—Claim not actionable unless cause of action already matured—Set off—Debtor can set off against assignee independent claims against assignor—Right of set off lost by conduct amounting to discharge of claim sought to be set off—Principal and surety—Mortgagor postponing right does not lose his personal remedy—Decree, when conditional on result of a different suit :*

Under section 130 of the Transfer of Property Act as it stood before it was amended by Act VI of 1900, a claim was not actionable unless it was 'a claim in respect of a cause of action which has already matured and which subject to procedure, may be enforced by suit.' *Shib Lal* v. *Azmat Ullah*, (I.L.R., 18 All., 265), followed. In an action by the assignee of a debt, the debtor-defendant is entitled to set off a debt due to him by the assignor at the date of the assignment, even when the amount claimed to be set off is due under a transaction independent of and unconnected with the claim assigned to plaintiff. Such right of set off will not be open to the defendant, if by his conduct, he has given up his right to proceed against the assignor personally for the debt. A mortgagee who consents to postpone his rights and accept the position of a second mortgagee, with the concurrence of the mortgagor, does not thereby lose his personal remedy against the mortgagor. Where a debtor transfers his property, with directions to pay off his debts, to a trustee, who does not undertake any personal liability to the creditors, the relationship of principal and surety is not constituted between the trustee and debtor, respectively. The fact that the defendant in a suit by the assignee is prosecuting a suit against the assignor, in which he might be awarded certain equitable reliefs against the assignor is no ground for refusing an unconditional decree to the assignee in his suit, unless the claims in the two suits are based on obligations arising out of the same contract and are so closely intertwined with each other as to make it equitable that they should be set against one another. *Government of Newfoundland* v. *Newfoundland Railway Company*, (L.R., 13 A.C., 212), refered to and distinguished. *Fleming* v. *Loe*, ([1901], 2 Ch.D., 594), referred to and distinguished.

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9. ————————————————————, s. 130—*Direction to pay, endorsed on instrument, amounts to assignment :*

A direction in writing to pay the amount due on an instrument, endorsed on such instrument by the payee thereof, coupled with the delivery of the instrument so endorsed to the person to whom payment is directed is an assignment of such document within the meaning of section 130 of the Transfer of Property Act. *Brandts, Sons & Co.* v. *Dunlop Rubber Company, Limited*, (L.R., 1 K.B., [1904], 387), distinguished.

Rama Iyen v. *Venkatachellam Pattar* 75

RUST ACT, s. 90 :—*See* "APPEAL."

. ———————*See* "TRANSFER OF PROPERTY ACT, s. 65."